Supreme Court, U. S.
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In the Supreme Court of the United States

No. Original

No. Original

STATE OF MAINE,
COMMONWEALTH OF MASSACHUSETTS, and
STATE OF VERMONT,
PLAINTIFFS,

v.

STATE OF NEW HAMPSHIRE,
DEFENDANT.

MOTION FOR LEAVE TO FILE COMPLAINT, COMPLAINT, and BRIEF SUPPORTING MOTION FOR LEAVE TO FILE COMPLAINT

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In the
Supreme Court of the United States

OCTOBER TERM, 1975

No. Original

STATE OF MAINE,
COMMONWEALTH OF MASSACHUSETTS,
and
STATE OF VERMONT,
PLAINTIFFS,

v.

STATE OF NEW HAMPSHIRE,
DEFENDANT.

MOTION FOR LEAVE TO FILE COMPLAINT

Invoking the original and exclusive jurisdiction of this Court under Article 3, Section 2 of the United States Constitution, under 28 U.S.C. § 1251(a), and pursuant to Rule 9 of the Rules of the Supreme Court of the United States, the State of Maine, Commonwealth of Massachusetts and State of Vermont, by their Attorneys General,

respectfully request leave to file their complaint which is submitted herewith, against the State of New Hampshire.

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Dated: August , 1975

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STATE OF NEW HAMPSHIRE,
DEFENDANT.

COMPLAINT

The State of Maine, by its Attorney General Joseph E. Brennan, the Commonwealth of Massachusetts, by its Attorney General Francis X. Bellotti, and the State of Vermont, by its Attorney General M. Jerome Diamond, bring this action against the State of New Hampshire and for their cause of action state:

I. Jurisdiction

1. This Court has original jurisdiction over this action under Article III, Section 2 of the Constitution of the

United States and under 28 U.S.C. § 1251, in that this is a controversy between two or more States.

II. Parties

2. Plaintiffs, State of Maine, Commonwealth of Massachusetts and State of Vermont, are sovereign States of the United States of America, appearing herein on behalf of themselves in their official and proprietary capacities.

3. Defendant, State of New Hampshire, is a sovereign State of the United States of America.

III. Factual Background

4. Effective July 1, 1970, the Legislature of the State of New Hampshire enacted a Commuters Income Tax, N.H. Rev. Stat. Ann. ch. 77-B (hereinafter referred to as the "Act").

5. The Act required every non-resident of New Hampshire earning income in New Hampshire in excess of $2,000 per year to pay a tax of 4 per cent of such income to New Hampshire, except that if such tax was in excess of any income tax imposed on that same income by the State of residence of the taxpayer, the New Hampshire tax was to be reduced to equal the tax which would be imposed by the State of residence. N.H. Rev. Stat. Ann. ch. 77-B:2, § II.

6. Although the Act also stated that "[a] tax is hereby imposed upon every resident of the state" who earned income outside New Hampshire (N.H. Rev. Stat. Ann. ch. 77-B:2, § I) the Act actually included two provisos which exempted all such income of New Hampshire residents from taxation, either if the income was taxable under the laws of the State where it was earned, or if the income

was not taxable under the laws of the State where it was earned (*Id.*).

7. Failure or refusal to pay the Commuters Income Tax to New Hampshire would have subjected non-resident taxpayers and their New Hampshire employers to criminal penalties of up to a $2,000 fine and one year's imprisonment. N.H. Rev. Stat. Ann. ch. 77-B:23.

8. In the years preceding passage of the New Hampshire Commuters Income Tax, Plaintiffs Maine, Massachusetts and Vermont had taxed all income of their residents and, in addition, taxed the income of non-residents which was derived within their respective borders. 36 Maine Rev. Stat. Ann. ch. 801-807; Mass. G.L. Ann. ch. 62; 32 Vt. Stat. Ann. ch. 151.

9. Plaintiffs Maine, Massachusetts and Vermont have allowed their residents to take full credits against the state income tax which otherwise would be payable to Plaintiffs, for income taxes imposed on their residents by other States. 36 Maine Rev. Stat. Ann § 5127; Mass. G.L. Ann. ch. 62, § 6A; 32 Vt. Stat. Ann. § 5825.

10. The net effect of the Act was to divert to the State of New Hampshire taxes which otherwise would be collected by Plaintiffs Maine, Massachusetts and Vermont, from their residents who earned income within the State of New Hampshire, without putting an additional burden on any individual taxpayer.

11. From July 1, 1970, through March 18, 1975, Defendant New Hampshire diverted tax revenues to itself from the Plaintiff States in approximate amounts which exceed:

for Maine — $2,970,754
for Massachusetts — $7,940,153
for Vermont — $2,841,961

12. Through imposition of its Commuters Income Tax, New Hampshire thus obtained more than $13.5 million from Plaintiffs Maine, Massachusetts and Vermont.

13. Plaintiffs cannot determine the exact amount of sums diverted to New Hampshire because some residents, having paid the New Hampshire tax, may not have filed returns in their home States as no tax remained to be paid to their home States.

14. All sums paid to New Hampshire by residents of the Plaintiff States, pursuant to the New Hampshire Commuters Income Tax, should have been paid to the Plaintiff States, and would have been so paid but for imposition of the New Hampshire tax.

15. Prior to passage of the Act, the New Hampshire Legislature was advised that the proposed Commuters Income Tax might be unconstitutional under the Privileges and Immunities Clause of Article IV of the United States Constitution.

16. For each taxable year, from 1970 through 1975, non-resident taxpayers paid their taxes to New Hampshire under the duress of criminal penalties.

17. Many non-resident taxpayers protested to New Hampshire that collection of the Commuters Income Tax was unconstitutional and illegal.

18. On December 6, 1971, a Petition for Declaratory Judgment was filed in the Superior Court for Merrimack County, State of New Hampshire, by three Maine Residents subject to the New Hampshire tax, on behalf of themselves and any residents of the State of Maine who were similarly situated.

19. Said Petition for Declaratory Judgment protested the New Hampshire tax and charged that the New Hampshire Commuters Income Tax was "arbitrary, discriminatory and retaliatory against the Plaintiffs herein and against all other citizens of the State of Maine similarly situated," and that the Commuters Tax was "a violation of their rights under the constitution of the United States of America and the constitution of the State of New Hampshire."

20. Said lawsuit was officially and actively encouraged, supported, and assisted by the State of Maine. The States of Maine and Vermont filed a brief *amici curiae* in the case.

21. On March 19, 1975, this Court upheld the claim that New Hampshire's taxing statute was unconstitutional. *Austin* v. *New Hampshire,* 44 U.S.L.W. 4400 (U.S. March 19, 1975).

22. Despite this Court's decision, New Hampshire continued to assess and collect its unconstitutional tax, as well as to expend the proceeds therefrom.

23. Despite this Court's decision, New Hampshire has refused to comply with Plaintiffs' demands that it cease collection of the prior year's taxes and repay to Plaintiffs all funds collected from their respective States pursuant to The Commuters Income Tax.

IV. Claim For Relief

24. Plaintiffs have suffered both direct and indirect injury, including substantial financial losses as sovereign States, due to Defendant's actions complained of herein.

25. The burden of the loss of funds collected pursuant to said Commuters Income Tax has been borne entirely by the Plaintiff States.

26. Plaintiffs are entitled to relief pursuant to the Privileges and Immunities Clause of Article IV of the

United States Constitution, federal common law and general principles of equity.

27. Plaintiffs have no adequate remedy at law and Plaintiffs have no remedy whatsoever in any other Court.

WHEREFORE, Plaintiffs pray:

1. That this Court enjoin the State of New Hampshire from withholding, assessing, collecting, retaining or expending any taxes which have been or which otherwise might be imposed upon residents of Maine, Massachusetts or Vermont, pursuant to the New Hampshire Commuters Income Tax, N.H. Rev. Stat. Ann. ch. 77-B.

2. That this Court order the State of New Hampshire to prepare a full accounting of all sums which have been collected from residents of Maine, Massachusetts and Vermont, pursuant to the New Hampshire Commuters Income Tax, N.H. Rev. Stat. Ann. ch. 77-B, and to forward said accounting to Plaintiffs.

3. That this Court order the State of New Hampshire to repay to Plaintiffs Maine, Massachusetts and Vermont, all sums which have been collected by New Hampshire from the residents of such States, pursuant to the New Hampshire Commuters Income Tax, N.H Rev. Stat. Ann. ch. 77-B.

4. That this Court order the State of New Hampshire, in addition to the repayment of taxes collected, to pay to Plaintiffs Maine, Massachusetts and Vermont, interest on such taxes, compounded annually from the date of their collection by New Hampshire to the date of their repayment to Plaintiffs.

5. That this Court order the State of New Hampshire to reimburse Plaintiffs Maine, Massachusetts and Vermont for the costs they have incurred in the preparation and litigation of this action.

6. That this Court grant such other and further relief as it may deem appropriate.

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Dated: August , 1975

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BRIEF SUPPORTING MOTION FOR LEAVE TO FILE COMPLAINT

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Jurisdiction

This is an action by the States of Maine, Massachusetts and Vermont in their sovereign capacity, against the State of New Hampshire, in its sovereign capacity, to recover tax funds diverted from the States of Maine, Massachusetts and Vermont to the State of New Hampshire. As such, this is an action over which this Court has original and exclusive jurisdiction under Article III, Section 2, of the Constitution of the United States and 28 U.S.C. § 1251(a).

Statutes Involved

The complete texts of the following state statutes are printed in the Appendix.

1. New Hampshire Commuters Income Tax, N.H. Rev. Stat. Ann. ch. 77-B (relevant sections)
2. Maine Income Tax Credit Law, 36 Me. Rev. Stat. Ann. § 5127
3. Massachusetts Income Tax Credit Law, Mass. Gen. L. Ann. ch. 62, § 6A
4. Vermont Income Tax Credit Law, Vt. Stat. Ann. ch. 151, § 5825

Question Presented

Whether New Hampshire should be required to account for and pay to the States of Maine, Massachusetts and Vermont, funds diverted from their treasuries to that of the State of New Hampshire, by the unconstitutional New Hampshire Commuters Income Tax?

Statement of the Case

The States of Maine, Massachusetts and Vermont are before the Court to recover funds diverted from their treasuries by the New Hampshire Commuters Income Tax, which was declared unconstitutional by this Court on

March 19, 1975. *Austin* v. *New Hampshire*, 43 U.S.L.W. 4400 (U.S. March 19, 1975).

Under the Commuters Income Tax, which became effective July 1, 1970, non-residents of New Hampshire earning income in New Hampshire were assessed a tax of 4 per cent on New Hampshire income in excess of $2,000, except that if such tax exceeded any tax imposed on that same income by the taxpayer's State of residence, the New Hampshire tax was reduced to equal the tax imposed by the State of residence. N.H. Rev. Stat. Ann. ch. 77-B:2, § II.

Plaintiffs Maine, Massachusetts and Vermont, like most other States, allow their residents to take full credits against their state income taxes for income taxes paid to other States. 36 Me. Rev. Stat. Ann. § 5127; Mass. G.L. Ann. ch. 62, § 6A; 32 Vt. Stat. Ann. § 5825.

The net effect of the New Hampshire statute was to tax non-residents, but only to the extent that their New Hampshire tax could be set off by a credit against taxes paid to their State of residence. By operation of the tax credit provisions, individual taxpayers would have to turn over to their States any money they might recover from New Hampshire. Thus, Plaintiff States bore the burden of the New Hampshire tax and will receive the benefits of any recovery from New Hampshire.

From July 1, 1970, through March 18, 1975, the Commuters Income Tax diverted tax revenues to New Hampshire from the Plaintiff States in approximate amounts which exceed:

for Maine — $2,970,754
for Massachusetts — $7,940,153
for Vermont — $2,841,961

The exact amounts so diverted cannot be determined because, *inter alia*, some residents paying the New Hampshire tax may not have filed returns in their home States, as no tax remained to be paid to their home States.

On December 6, 1971, a Petition for Declaratory Judgment was filed in the Superior Court for Merrimack County, New Hampshire, by three Maine citizens subject to the New Hampshire tax, on behalf of themselves and all other Maine citizens similarly situated. The Petition charged that the New Hampshire Commuters Income Tax was unconstitutional.

The contentions of the Plaintiffs therein ultimately were upheld by this Court in *Austin* v. *New Hampshire,* 43 U.S.L.W. 4400 (U.S. March 19, 1975), and the New Hampshire Commuters Income Tax was declared unconstitutional and illegal.

Despite this Court's decision, New Hampshire continued to collect previously withheld Commuters Income Taxes and to spend its proceeds. Further, New Hampshire has refused to comply with Plaintiffs' demands that it cease collection of the tax and repay to Plaintiff States all funds collected from their respective States pursuant to the tax.

Summary of Argument

The New Hampshire Commuters Income Tax statute was purposefully designed to and did in fact divert many millions of tax dollars to the state treasury of New Hampshire, which otherwise would have gone to the state treasuries of Maine, Massachusetts and Vermont. By this action, Plaintiffs seek to redress direct injury to their governmental and proprietary interests, which injury was caused by New Hampshire acting in its governmental capacity. This Court has original and exclusive jurisdiction over the controversy.

Plaintiffs are before this Court as sovereign States, to recover funds which New Hampshire, acting as a sovereign State, unlawfully diverted. Attempts at diplomatic resolution having failed, an original action before this Court is the appropriate means to resolve the controversy. The factual posture of the case, with few, if any, facts being subject to dispute, makes this Court's exercise of its original jurisdiction particularly appropriate.

Plaintiffs have a clear right to the relief sought—return of the millions collected by New Hampshire under its unconstitutional tax scheme. First, Plaintiffs are entitled to retroactive application of *Austin* v. *New Hampshire,* 43 U.S.L.W. 4400 (U.S. March 19, 1975). That decision set no new principle of law, decided no issue of first impression, and Defendant was advised of the statute's unconstitutionality, by responsible state officials, prior to its passage. Second, the taxes were paid under duress and now are subject to recovery as a matter of general tax law. Third, the balance of the equities as between Plaintiffs and Defendant weigh heavily in favor of ordering New Hampshire to disgorge its unlawful gains.

Although it is impossible to fully compensate Plaintiffs for Defendant's intentional depletion of their sources of revenue, an award of interest in addition to the principal amount of taxes due would be equitable. New Hampshire's own statutory and case law supports recovery of interest and such an award might deter other States from enacting facially unconstitutional tax measures.

Argument

I. Plaintiffs Have Standing To Protect Their Proprietary Interests.

In *Austin* v. *New Hampshire,* 43 U.S.L.W. 4400 (U.S. March 19, 1975), New Hampshire argued that, "since the economic impact of the diversion of revenue falls *first* upon the State of Maine, the State of Maine is the proper party to litigate any injuries claimed to result therefrom." Brief for Appellee at 8. The States of Maine, Massachusetts and Vermont now stand before this Court, seeking redress for the diversion of revenue caused by New Hampshire's unconstitutional tax.

The Supreme Court's original jurisdiction over suits between States rests upon Section 2 of Article III of the United States Constitution. Clause 1 of Section 2 places controversies among the States within the judicial power

of the United States. "The judicial power shall extend . . . to controversies between two or more States . . . ." *U. S. Const.*, art. III, §2. The second clause of this Section gives the Supreme Court original jurisdiction over such cases. "In all cases . . . in which a State shall be a party, the Supreme Court shall have original jurisdiction." *Id.*

Congress, acting pursuant to the authority thus ceded to the federal government, has declared that such original jurisdiction shall lie exclusively in the Supreme Court for cases between two or more States. "The Supreme Court shall have original and exclusive jurisdiction of: (1) All controversies between two or more States . . . ." 28 U.S.C. §1251(a)(1).

The Supreme Court's original and exclusive jurisdiction is to be exercised whenever the complaining state is suing for the protection of its own, proprietary interests. *Texas* v. *Florida*, 306 U.S. 398 (1939); *North Dakota* v. *Minnesota*, 263 U.S. 365 (1923). This is particularly appropriate when the action complained of can be attributed to the government of the defendant State. *Texas* v. *New Jersey*, 379 U.S. 674 (1965); *Louisiana* v. *Texas*, 176 U.S. 1 (1900).

Historically, Article III had been construed to permit a citizen of one State to file an action in the Supreme Court against another State. *Chisholm* v. *Georgia*, 2 U.S. 419 (1793); *Grayson* v. *Virginia*, 3 U.S. 320 (1796). However, the Eleventh Amendment to the United States Constitution was ratified, from 1794 to 1797, in order to overturn the *Chisholm* ruling. *Cohens* v. *Virginia*, 19 U.S. 264 (1821). Thus, the Eleventh Amendment cannot be avoided, and original jurisdiction is not available, where a State sues in an action which really is brought on behalf of designated individuals. *Illinois* v. *Michigan*, 409 U.S. 36 (1972); *Arkansas* v. *Texas*, 346 U.S. 368 (1953); *Oklahoma ex rel. Johnson* v. *Cook*, 304 U.S. 387 (1938); *North Dakota* v. *Minnesota*, 263 U.S. 365 (1923); *New Hampshire* v. *Louisiana*, 108 U.S. 76 (1883).

The Eleventh Amendment does not bar suits which are brought to protect the genuine interests of a State.

> "The right of a state as parens patriae to bring suit to protect the general comfort, health, or property rights of its inhabitants, threatened by the proposed or continued action of another state, by prayer for injunction, is to be differentiated from its lost power as a sovereign to present and enforce individual claims of its citizens as their trustee against a sister state." *North Dakota* v. *Minnesota*, 263 U.S. 365, 375-376 (1923).

The States lost their power to enforce claims for individual citizens, as a trustee in the Supreme Court, by ratifying the Eleventh Amendment. The States have retained their power to enforce claims in the Supreme Court against other States, for damage to their proprietary or governmental interests. *Virginia* v. *West Virginia*, 246 U.S. 565 (1918); *Rhode Island* v. *Massachusetts*, 37 U.S. 657 (1838); *New Jersey* v. *New York*, 30 U.S. 284 (1831).

To determine whether a State is the real party in interest, the Court must look to the effect of the judgment or decree which is sought. *Kansas* v. *United States*, 204 U.S. 331 (1907). Plaintiffs seek herein to recoup losses suffered by their state treasuries, due to New Hampshire's direct diversion of tax dollars from Plaintiffs' citizens. The effect of the relief sought by Plaintiffs will be to reimburse their general state treasuries for the tax revenues which were diverted by New Hampshire.

In the first case which interpreted the impact of the Eleventh Amendment on original jurisdiction actions, this Court noted that only suits which could have been initiated by individual citizens prior to adoption of the Amendment were to be barred thereafter from prosecution by the States on behalf of such citizens. *New Hampshire* v. *Louisiana*, 108 U.S. 76, 91 (1883). The issue in that case was stated as follows:

> "Under the operation of [the Eleventh] Amendment the actual owners of the bonds and coupons held by New Hampshire and New York are precluded fr

> prosecuting these suits in their own names. The real question, therefore, is, whether they can sue in the name of their respective States after getting the consent of the State, or, to put it another way, whether a State can allow the use of its name in such a suit for the benefit of one of its citizens." 108 U.S. at 88.

New Hampshire did not have the requisite state interest, as supposed assignee of its residents' interests in Louisiana bonds, where in fact the litigation was financed by the bond owners, only the individuals were authorized to settle the case, and only the individuals would receive any money recovered. *Id.*

Similarly, there was no adequate State interest where the impact of a sister State's laws discriminated against particular shippers, only affected those shippers, and the shippers themselves had standing to sue. *Alabama* v. *Arizona,* 291 U.S. 286 (1934). Jurisdiction also was denied where the plaintiff State attempted to assert an exemption guaranteed to its individual citizens by the state of a sister State. *Massachusetts* v. *Missouri,* 308 U.S. 1 (1939).

The case at bar presents the clearest example of the proper invocation of this Court's original and exclusive jurisdiction. First, the judgment sought will benefit no particular individuals, but will protect the sovereign interests of Plaintiffs in their general state treasuries. Second, the funds produced will be applied to Plaintiffs' general governmental purposes of providing for the health, safety and welfare of their citizens. Third, the acts complained of were taken directly by the State of New Hampshire acting as a sovereign, through the New Hampshire Legislature performing the governmental function of enacting a general revenue-raising measure. Fourth, Plaintiffs do not seek relief from any particular individuals in New Hampshire government. These taxes were not levied and collected pursuant to maladministration of a statute or the wrongful acts of particular officials; they were collected in compliance with New Hampshire law.

In addition to protecting their inherent power to raise revenue (*Illinois Central R. Co.* v. *Decatur,* 147 U.S. 190 (1893); *Thomson* v. *Union Pacific R. Co.,* 76 U.S. 579 (1870); *M'Culloch* v. *Maryland,* 17 U.S. 316 (1819)), Plaintiffs bring this suit to redress direct injury to the economy of their States. Such protection of its economy is recognized as a "quasi-sovereign" interest, for the protection of which a State may invoke this Court's original jurisdiction. *Georgia* v. *Pennsylvania R. Co.,* 324 U.S. 439, 444, 448 (1945). New Hampshire's unjust drainage of Plaintiffs' treasuries has been one of the factors contributing to taxes necessarily imposed on Plaintiffs' citizens at higher levels than they would have been imposed but for this loss of revenue.

Plaintiffs' loss of millions of dollars in taxes certainly is as direct and significant as the injury suffered by a State suing to enjoin the discharge of sewage into a river (*Missouri* v. *Illinois,* 180 U.S. 208 (1901)), to prevent the discharge of noxious fumes across the State's border (*Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230 (1907)), to recover access to oyster beds (*Louisiana* v. *Mississippi,* 202 U.S. 1 (1906)); or to enforce a boundary agreement (*Nebraska* v. *Iowa,* 406 U.S. 117 (1972)).

In *South Dakota* v. *North Carolina,* 192 U.S. 286 (1904), the defendant State was ordered to pay $27,400 to South Dakota, plus costs of the suit, upon certain government bonds.

> "[I]t is enough to say that the clear import of the decisions of this court from the beginning to the present time is in favor of its jurisdiction over an action brought by one state against another to enforce a property right. *Chisholm* v. *Georgia,* [2 U.S. 419 (1793)] was an action of assumpsit; *United States* v. *North Carolina* [136 U.S. 211 (1890)], an action of debt; *United States* v. *Michigan,* [190 U.S. 379 (1903)], a suit for an accounting; and that which was sought in each was a money judgment against the defendant state." *Id.* at 318.

Plaintiffs are seeking to recover damages for New Hampshire's unconstitutional diversion of tax dollars from their state treasuries to that of Defendant. As such, Plaintiffs' claim is directly analogous to that presented in *Virginia* v. *West Virginia,* 238 U.S. 202 (1915) and 246 U.S. 565 (1918), where one State sought and won a money judgment against another. This case also is similar to the numerous instances where this Court has exercised its original jurisdiction to prevent the diversion of natural resources flowing from one State to another. *Arizona* v. *California,* 373 U.S. 546 (1963); *New Jersey* v. *New York,* 345 U.S. 369 (1953); *Nebraska* v. *Wyoming,* 325 U.S. 589 (1945); *Colorado* v. *Kansas,* 320 U.S. 383 (1943); *Wisconsin* v. *Illinois,* 309 U.S. 569 (1940); *Wyoming* v. *Colorado,* 298 U.S. 573 (1936); *Arizona* v. *California,* 298 U.S. 558 (1936); *Washington* v. *Oregon,* 297 U.S. 517 (1936); *Arizona* v. *California,* 283 U.S. 423 (1931); *Pennsylvania* v. *West Virginia,* 262 U.S. 553 (1923); *Wyoming* v. *Colorado,* 259 U.S. 419 (1922).

As a general matter of tax law, the real party in interest in tax refund matters is the party which ultimately bears the burden, not the party who initially pays the tax. *Furman University* v. *Livingston,* 136 S.E. 2d 254 (S. Car. 1964); 72 Am. Jur. 2d *State and Local Taxation* §1071. With regard to a parts vendor which had passed the tax burden on to its purchasers, this Court in interpreting a tax recovery statute[1] stated: "If he has shifted the burden to the purchasers, they and not he have been the actual sufferers and are the real parties in interest." *United States* v. *Jefferson Electric Mfg. Co.,* 291 U.S. 386, 402 (1934). *Accord, Travel Industries of Kansas, Inc.* v. *United States,* 425 F.2d 1297 (10th Cir. 1970).

Maine, Massachusetts and Vermont are properly before the Supreme Court seeking to protect their governmental interests by an order implementing *Austin* v. *New Hampshire,* 43 U.S.L.W. 4400 (U.S. March 19, 1975).

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[1] Then Sec. 424 of the Revenue Act of 1928, now 26 U.S.C. §6416(a).

II. The Supreme Court Is the Proper Forum.

In a legitimate controversy between States over specific property interests, it is the responsibility of the Supreme Court to exercise its original jurisdiction and settle the question, since the States separately do not have the constitutional power to resolve the controversy. *Texas* v. *New Jersey,* 379 U.S. 674 (1965) (right to escheat debts owed by Sun Oil Company); *Western Union Tel. Co.* v. *Pennsylvania,* 368 U.S. 71 (1961) (right to escheat money orders); *Texas* v. *Florida,* 306 U.S. 398 (1939) (right to collect death taxes). "Neither State can legislate for, or impose its own policy upon the other." *Kansas* v. *Colorado,* 206 U.S. 46, 95 (1907).

Placement of such responsibility in the Supreme Court reflects the historical purpose of the constitutional provision for original jurisdiction—to offer a method of settling disputes between sovereign powers, which disputes traditionally could be settled only by diplomacy or war. *Nebraska* v. *Wyoming,* 325 U.S. 589 (1945); *Georgia* v. *Pennsylvania R. Co.,* 324 U.S. 439 (1945); *North Dakota* v. *Minnesota,* 263 U.S. 365 (1923).

The concept of sovereignty which underlies the instant case requires that this Court exercise its jurisdiction and resolve the dispute, by application of federal common law. *See, Kansas* v. *Colorado,* 206 U.S. 46 (1907). "[P]roceedings under this Court's original jurisdiction are basically equitable in nature . . . ." (*Ohio* v. *Kentucky,* 410 U.S. 641, 648 (1973)) and, in actions between States, neither the statutes nor the decisions of either State can be conclusive. "For the decision of suits between States, federal, state and international law is considered and applied by this court as the exigencies of the particular case may require." *Connecticut* v. *Massachusetts,* 282 U.S. 660, 670 (1931). *Accord, Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.,* 304 U.S. 92, 110 (1938).

Although it might be impossible, or at least inappropriate, for any State court to decide this case, the Supreme Court has ample authority to do so. This Court certainly

may enforce a decision which adjudicates the conflicting claims of two or more States. Such enforcement authority, including enforcement of a money judgment, is inherent in the constitutional provision for original and exclusive Supreme Court jurisdiction over such controversies. *Virginia* v. *West Virginia,* 246 U.S. 565, 591 (1918).

Plaintiffs' claim against New Hampshire presents a clearly-defined, justiciable controversy, which is susceptible of enforcement under settled common law and equitable principles. At issue are the Plaintiff States' rights to a defined fund of tax collections. The evidence necessary to adjudicate the issues is all documentary in nature, so there can be little, if any, factual dispute.

Where a controversy between States is justiciable and the necessity for action by this Court is absolute, as in the case at bar, original jurisdiction is available. *Illinois* v. *City of Milwaukee,* 406 U.S. 91, 95 (1972); *Alabama* v. *Arizona,* 291 U.S. 286, 291 (1934); *Louisiana* v. *Texas,* 176 U.S. 1, 15 (1900).

New Hampshire imposed and collected an unconstitutional tax from Plaintiffs' citizens, for the declared purpose of raising revenue at the expense of Maine, Massachusetts and Vermont, but without imposing any burden on its own taxpayers. This Court so held and Defendant has so stated, pointing out that the tax "merely diverts to New Hampshire an amount which would otherwise be paid to the home State." Brief for Appellee at 4, *Austin* v. *New Hampshire,* 43 U.S.L.W. 4400 (U.S. March 19, 1975). New Hampshire further emphasized this point, stating that: "It may be taken as given that the Commuters Income Tax, in conjunction with the Maine Income Tax provisions, results in a diversion to New Hampshire of tax revenues otherwise available to Maine." *Id.* at 7.

The New Hampshire Supreme Court reached this same conclusion, construing the New Hampshire statute and finding its impact to rest on the home states of the non-resident taxpayers.

> "The effect of the Maine credit and the New Hampshire limitation is that New Hampshire collects a tax from Maine residents working in New Hampshire which otherwise would be paid in the same amount to the State of Maine." *Austin* v. *State Tax Commission,* 114 N.H. 137, 138, 316 A.2d 165, 166 (1974), *rev'd. sub nom., Austin* v. *New Hampshire,* 43 U.S. L.W. 4400 (U.S. March 19, 1975).

The fact that Plaintiffs have suffered a direct loss of several millions of dollars is not subject to legitimate dispute.

After four years of litigation, this Court overturned the plainly unlawful New Hampshire taxing statute, relying primarily on the language of the Privileges and Immunities Clause (*U.S. Const.,* art. IV, §2, cl. 1) and the sharp contrast between three cases where other non-resident taxes had been rejected (*Travis* v. *Yale & Towne Mfg. Co.,* 252 U.S. 60 (1920); *Travellers Insurance Co.* v. *Connecticut,* 185 U.S. 364 (1902); *Ward* v. *Maryland,* 79 U.S. 418 (1870)) and one case where a differing tax had been upheld (*Shaffer* v. *Carter,* 252 U.S. 37 (1920)). The *Austin* decision was founded on clear constitutional precedents and stated no new or abstruse principle of law.

The illegality of the New Hampshire tax scheme is not subject to legitimate dispute.

Plaintiffs responded to *Austin* by requesting that New Hampshire cease collection of the tax and return the monies it already had collected—an attempt to resolve this controversy through normal diplomacy between sovereign States. New Hampshire responded by refusing to negotiate, by rejecting our claims for reimbursement, and by continuing to collect taxes for 1974 (which became due on April 15, 1975) as well as for 1975 (by directing employers to remit all taxes withheld through March 18, 1975, "on or

before the due date for the first quarter return which is April 30, 1975." *New Hampshire Tax Ruling No. 3:77-B* (March 26, 1975)).

Plaintiffs' individual taxpayers responded to *Austin* by filing claims with the New Hampshire Department of Revenue Administration, for refunds of taxes collected or withheld under the Commuters Income Tax statute. New Hampshire responded with form letters stating that "the law does not require a refund of this tax for any taxable period prior to March 19, 1975."

Plaintiffs have no effective alternative forum. Individual taxpayer suits would be fruitless, because New Hampshire already has stated its position; would be pointless, because Plaintiffs herein ultimately would be entitled to receive the proceeds of such litigation; and would be judicially wasteful, creating innumerable lawsuits and subjecting all litigants to costly delays.

The fact that Plaintiffs have no alternative forum but the Supreme Court is not subject to legitimate dispute.

III. Plaintiffs Have a Clear Right to Relief.

The imposition of an unconstitutional tax by one State that falls, in effect, upon another State, gives rise to a right of recovery, as in any other instance where one State violates the legally protected interest of another State.

A. *Austin Should Be Applied Retroactively.*

This Court has employed a balancing approach to retroactivity looking at "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Lemon* v. *Kurtzman,* 411 U.S. 192, 199 (1973) (quoting *Linkletter*

v. *Walker,* 381 U.S. 618, 619 (1965)). The criteria for determining retroactive or prospective application were set forth in *Chevron Oil Company* v. *Huson,* 404 U.S. 97, 106-107 (1971).

> "In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied [citation] or by deciding an issue of first impression *whose resolution was not clearly foreshadowed* [citation]. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' [citation] Finally, we have weighed the inequity imposed by retroactive application, for '(w)here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.' [citation]" (emphasis supplied)

By each of these tests, *Austin* v. *New Hampshire* should be applied retroactively.

(1) *The Austin Decision Was "Clearly Foreshadowed"*

The resolution in *Austin* was so clearly foreshadowed that even the authors of the New Hampshire Statute recognized the constitutional problem.

The Commuters Income Tax initially was recommended to the New Hampshire legislature by a Citizens Task Force reviewing New Hampshire government organization and revenue sources. The constitutional infirmity of the tax clearly was before that Task Force. A minority report filed by a member of the Task Force executive committee stated:

> "*The Constitutionality of the Non-Resident Income Tax is in Doubt:* Information available to the Executive Committee left a doubt as to the constitutionality of the Non-Resident Income Tax. Should this measure be declared unconstitutional, the $2,400,000 revenue gain referred to in the preceding paragraph would shrink to $700,000. In terms of the overall tax and spending proposals of the Executive Committee, it could mean a $700,000 deficit for this biennium." *Report of the Citizens Task Force* at p. 58 (Jan. 7, 1970) (emphasis in original).

Similarly, the New Hampshire legislature was directly on notice of the Constitutional infirmity when it enacted the Commuters Tax into law. During debate in the New Hampshire House of Representatives, the tax bill's sponsor placed in the House Journal a letter from the attorney who drafted the tax bill to the Chairperson of the House Ways and Means Committee. (The full text is appended to this brief.) It stated in part:

> "Generally, this bill is designed to impose an income tax on non-residents on income earned in this state. . . . The intent of this bill is not to tax any resident of this state and it is my belief that the bill, as drawn in this amendment, will not tax any New Hampshire residents. However, in order to make this tax meet constitutional requirements, it is necessary for us to

> impose a tax in the first instance upon residents as well as non-residents.
>
> ". . . The net result is that no New Hampshire resident will be required to pay a tax.
>
> "As to non-residents, RSA 77-A:2, II provides that they shall pay a tax of 4 per cent of their income earned within the State of New Hampshire. It further provides that in cases where non-residents are taxed by their home state and such tax is at a rate of less than 4 per cent, the tax hereby imposed shall be reduced to equal the amount of the tax which would be imposed by the taxpayer's home state. The significance of this provision is that *no non-resident will thus be required to pay more tax to New Hampshire than to his home state* and *he, therefore, will have no reason to question the validity of this tax.* The end result of the tax imposed by this bill will be, therefore, to *give to the State of New Hampshire most of the tax collected by our neighboring states on their residents* on income earned within the State of New Hampshire *without putting an additional burden on any individual taxpayer.*" *New Hampshire House Journal* at 131-132 (April 14, 1970) (emphasis supplied).

In short, the New Hampshire House was told that taxes could be diverted from neighboring States, but that by not increasing any individual taxpayer's net liability, New Hampshire hoped that nothing would be done about it.

The letter also noted that a provision had been added which taxed, but then exempted, New Hampshire residents "in order to make this tax meet constitutional requirements." This superficial attempt to circumvent the Privileges and Immunities Clause was quickly rejected by the *Austin* Court, 43 U.S.L.W. 4400 (U.S. March 19, 1975).

Thus, New Hampshire's own records demonstrate an awareness of the constitutional pitfalls of the tax and the risk the State was taking in adopting it.

The relevance of such awareness is indicated in *Lemon* v. *Kurtzman* (*II*), 411 U.S. 192 (1973). In the first *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), a Pennsylvania statute reimbursing non-public sectarian schools for secular educational services was held invalid. On remand, the District Court permitted the State to reimburse the non-public schools for services provided *before* the Court's decision in *Lemon I*. The Court in *Lemon II* stressed both the novelty and unpredictability of its decision in *Lemon I*:

> "We conclude, however, that our holding in *Lemon I* 'decid(ed) an issue of first impression whose resolution was not clearly foreshadowed.' [citation] A three-judge district court, with one dissent, upheld Act 109. Soon after, another three-judge district court in Rhode Island held unconstitutional the Rhode Island statutory scheme we considered together with Pennsylvania's program in *Lemon I*. Nor were district courts alone in disagreement over the constitutionality of *Lemon*-style plans to provide financial assistance to sectarian schools. This Court was itself divided when the issue was ultimately resolved after full briefing and argument. And the Court acknowledged 'that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.' " *Lemon* v. *Kurtzman* (*II*), 411 U.S. 192, 206 (1973).

If *Lemon II* is an example of a case where novel doctrine is not retroactively applied, *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), is a clear reminder that in the absence of what is, in essence, a

decision overturning a prior line of cases, retroactive application of a judgment is the rule, not the exception. Since *Austin* overturned no prior case law, announced no new principles, resolved no competing lines of authority, but simply reaffirmed legal principles which have been clear since the 1920's, *Hanover Shoe* is controlling.

In that case, the plaintiff company had won a treble damage antitrust action against the defendant for monopolization of the shoe machinery market. The period of limitation under the applicable statute commenced July 1, 1939. The suit was filed September 21, 1955. The Court of Appeals disallowed the district court's award of damages for the full period of limitations, holding instead that the focal date was June 10, 1946, the date on which the Supreme Court announced *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946).

However, the Supreme Court held that *American Tobacco* (unlike *Lemon I* and similar to *Austin*) had not fundamentally altered the law of monopolization.

> "The theory of the Court of Appeals seems to have been that when a party has significantly relied upon a clear and established doctrine, and the retrospective application of a newly declared doctrine would upset that justifiable reliance to his substantial injury, considerations of justice and fairness require that the new rule apply prospectively only. . . . There is, of course, no reason to confront this theory unless we have before us a situation in which there was a clearly declared judicial doctrine upon which United relied and under which its conduct was lawful, a doctrine which was overruled in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful. . . .

> "Neither the opinion in [*United States* v. *Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945)] nor the opinion in *American Tobacco* indicated that the issue involved was novel, that innovative principles were necessary to resolve it, or that the issue had been settled in prior cases in a manner contrary to the view held by those courts." *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481, 496 (1968).

The *Hanover Shoe* Court also set forth the criterion for a finding of novel doctrine, requiring that there be "such an abrupt and fundamental shift in doctrine as to constitute an entire new rule which in effect replaced an older one." *Id.* at 498.

Austin did not constitute "an abrupt and fundamental shift in doctrine", nor was it *any* shift in doctrine whatsoever. Without overruling or narrowing any decision, the *Austin* Court relied principally on *Travis* v. *Yale and Towne Mfg. Co.,* 252 U.S. 60 (1920), *Shaffer* v. *Carter,* 252 U.S. 37 (1920), *Travellers Insurance Co.* v. *Connecticut,* 185 U.S. 364 (1902), and *Ward* v. *Maryland,* 70 U.S. (12 Wall.) 418 (1870).

Presumably, New Hampshire also could have looked to these precedents for guidance. In fact, at least a minority of the Governor's Task Force, and perhaps the author of the legislation, did so before the Commuters Income Tax was adopted.

Even though *Hanover Shoe* involved treble damages, the Court did not back away from the plain consequences of an absence of novel doctrine in *American Tobacco:*

> "In these circumstances, there is no room for argument that Hanover's damages should reach back only to the date of the *American Tobacco* decision. Having rejected the contention that *Alcoa-American Tobacco*

> changed the law of monopolization in a way which should be given only prospective effect, it follows that Hanover is entitled to damages for the entire period permitted by the applicable statute of limitations." *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481, 502 (1968).

By prior precedent and by New Hampshire's own awareness, the *Austin* decision was "clearly foreshadowed." It should apply retroactively.

(2) *There Is No Inequity To Be Imposed By Retroactive Application of Austin.*

The inequities suggested in *Chevron Oil Company* v. *Huson,* 404 U.S. 97 (1971), and *Lemon II* are basically problems of third party reliance, such as this Court addressed in *Cipriano* v. *City of Houma,* 395 U.S. 701 (1969) and *City of Phoenix* v. *Kolodziejski,* 399 U.S. 204 (1970). In both *Cipriano* and *City of Phoenix,* this Court overruled long standing practices which limited eligibility in bond elections to property taxpayers. The Court refused retroactive application because of the substantial reliance, over many years, on a past practice with which the Court clearly was breaking in its new decisions.

Here, there is no broad past practice. There was one illegal tax scheme, a tax scheme which was the first of its kind and was subject to court challenges almost from the start. If New Hampshire did rely upon the constitutionality of their novel tax, it was at their peril. Certainly, no one has undertaken specific agreements with New Hampshire in expectation of receipts from the Commuters Income Tax, at least insofar as that might be reflected in the public laws or the statutory history of the Commuters Income Tax.

The requirement to pay back the total amount levied under the Commuters Income Tax may create a fiscal burden for New Hampshire, as it was designed to and did, in fact, create a burden for Plaintiffs. The present question, however, is who should bear the responsibility of that fiscal burden — the State which imposed and collected the unconstitutional tax or the States whose treasuries were drained unlawfully. It would be inappropriate for New Hampshire to win the retention of such gains on grounds that their return would cause financial hardship, when their collection has caused financial hardship to Plaintiffs.

During the period of the imposition of the Commuters Income Tax, each of the Plaintiff States has had to look to other sources of revenue, in an amount that is necessarily the same principal amount as that diverted by New Hampshire. To allow New Hampshire to escape repayment, on the theory that there would be some disruption to its fiscal expectation, would encourage other States to adopt similar predatory tax measures without regard to constitutional niceties, since a judgment of invalidity, when finally obtained, would only operate *in futuro*.

At a time when all States of the Union are subjected to unusually severe fiscal problems, a decision against retroactivity here could encourage further legislative adventurism.

B. *The Plaintiff States Should Not Be Penalized.*

Theoretically, the Plaintiff States could have reduced or avoided their losses, by revoking their tax credit laws or by enacting retaliatory laws. However, they should not be denied recovery for not taking such action during the pendency of the *Austin* litigation.

This Court has long maintained that States should not attempt to correct discrimination against their citizens by retaliation. Avoidance of such retaliation "was one of the chief ends sought to be accomplished by the adoption of the Constitution." *Travis* v. *Yale and Towne Mfg. Co.*, 252 U.S. 60, 82 (1920).

The Court's concern about retaliation was one of its chief bases for the *Austin* decision. If *Austin* is not applied retroactively to secure return of revenues to Maine, Massachusetts and Vermont, these States will be punished because they did not take retaliatory action, either through revoking tax credits for their own residents or attempting to increase tax burdens upon those New Hampshire residents and businesses over which the three States could exercise some jurisdiction.

Further, there is a serious question as to the type of retaliatory action that the States reasonably could have taken, yet stay within constitutional limits. Mr Justice Blackmun, dissenting in *Austin*, suggested that Plaintiffs' losses could have been avoided simply and easily, through denial of tax credits to their residents who pay taxes to New Hampshire. In addition to the legal impropriety of doubly taxing a special class of Plaintiffs' taxpayers, such a suggestion does not take account of the long history and importance of tax credits in the Federal structure. Currently, 40 States impose general income taxes. *CCH State Tax Guide (All States Unit)* ¶ 15-000 at 1531-34. All of these States allow a credit against taxes otherwise payable to them, for taxes actually paid by their residents to other States. *Id.* at 1543. In this way, Plaintiffs are consistent with the large majority of their sister States.

Mutual credits serve the important purpose of preventing double taxation, a purpose long recognized and approved. *Reiling* v. *Lacy*, 93 F. Supp. 462 (D. Md. 1950),

app. dismissed, 341 U.S. 901 (1951); *Henley* v. *Franchise Tax Board,* 122 Cal. App. 2d 1, 264 P. 2d 179, 182 (1954). The policy of avoiding double tax burdens also is reflected at the Federal level. The Federal income tax law allows credits, similar to those allowed by the Plaintiff States, to United States residents who also must pay income taxes to foreign countries. *Int. Rev. Code of 1954,* 26 U.S.C. § 901 *et seq.* The Federal Government also has articulated a policy favoring avoidance of double taxation through international agreements. *E.g., The Convention with Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income,* T.I.A.S. No. 7365.

Plaintiffs, in adopting income taxes and allowing residents' income tax credits to avoid double taxation, are consistent with the policies of a vast number of States and the policy of the Federal Government. If Plaintiffs had revised their income tax laws to deal with the special situation presented by New Hampshire, they would have forsaken a generally accepted pattern of reciprocal tax credits to deal with the unique, and as it turned out illegal, taxing scheme of one State which did not fit the pattern of taxation in most of the States. Further, had the Plaintiff States denied the benefits of the tax credit only to those residents who pay taxes in New Hampshire, there might well have been privileges and immunities and equal protection problems with such discriminatory actions.

It should not be necessary to enact a discriminatory statute in order to gain relief from a sister State's discriminatory statute. To date, this Court has offered an effective and appropriate means for resolution of such a situation. Plaintiff States refused to back away from the normal pattern of tax laws and exercised restraint in not taking retaliatory action against New Hampshire, or against their residents who earn incomes in New Hamp-

shire. Such restraint should not now become a bar to the States' recovering for losses caused by the illegal New Hampshire tax.

C. *The Taxes Were Paid Under Duress.*

An old rule of common law held that: "One who voluntarily pays a tax imposed by an unconstitutional law, without knowing that the law is unconstitutional, cannot recover the amount so paid." *Prescott* v. *Memphis,* 154 Tenn. 462, 285 S.W. 587, 48 A.L.R. 1378, 1382 (1926). To the extent that this rule is still good law, it underscores the propriety of Plaintiffs' claim for relief in the instant case.

Initially, courts required proof of actual duress, which was interpreted as actual or impending restraint of person or property, in order to find sufficient involuntariness in tax payments to allow recovery of taxes paid and later deemed illegal or excessive. Thus, this Court held in *Radich* v. *Hutchins,* 95 U.S. 210, 213 (1877):

> "To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary . . . there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making the payment."

This doctrine continued through *Union Pac. R. R. Co.* v. *Bd. of County Comm'rs.,* 98 U.S. 541 (1879), *Little* v. *Bowers,* 134 U.S. 547 (1890), and *Chesebrough* v. *United States,* 192 U.S. 253 (1904).

The old rule began to change, however, with *Atchison, Topeka & Santa Fe Ry. Co* v. *O'Connor,* 223 U.S. 280 (1912). The tax statute in *Atchison* provided that property could be summarily seized and substantial penalties could be imposed, if the railroad refused to pay. In these respects, the fact situation did not differ much from *Union Pac. R.R. Co.* v. *Bd. of County Comm'rs.,* 98 U.S. 541 (1879), or *Little* v. *Bowers,* 134 U.S. 547 (1890). In finding for the railroad, however, the Court backed away from its earlier cases and adopted a doctrine of "implied duress."

Mr. Justice Holmes stated the general principle that a taxpayer may recover taxes paid under the *threat* of the State's exercise of a summary statutory remedy, providing penalties for nonpayment of the tax.

> "It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that apart from special circumstances he cannot interfere by injunction with the State's collection of its revenues, an action at law to recover back what he has paid is the alternative left. Of course we are speaking of those cases where the State is not put to an action if the citizen refuses to pay. In these latter he can interpose his objections by way of defence, but when, as is common, the State has a more summary remedy, such as distress, and the party indicates by protest that he is yielding to what he cannot prevent, courts sometimes perhaps have been a little too slow to recognize the implied duress under which payment is made. But even if the State is driven to an action, if at the same time the citizen is put at a serious disadvantage in the assertion of his legal, in this case of his constitutional, rights, by defence in the suit, justice may require that he should be at liberty to avoid those disadvantages by paying promptly and bringing suit on his side. He is entitled to assert his supposed right on reasonably equal terms." *Atchison, Topeka & Santa Fe Ry. Co.* v. *O'Connor,* 223 U.S. 280, 285-86 (1912).

Gaar, Scott & Co. v. *Shannon,* 223 U.S. 468 (1912), states this same principle, although recovery was denied in its particular circumstances, because the plaintiffs were not in the class to which the statute applied.

The complete break with the past and acceptance of the doctrine of implied duress, where business disruption or penalties could be anticipated for failure to pay taxes, was made in *Ward* v. *Love County,* 253 U.S. 17 (1920). There, the Court specifically stated that the strict views it had taken in such cases as *Union Pac. R.R. Co.* v. *Bd. of County Comm'rs.,* 98 U.S. 541 (1879), had been modified by later cases.[2]

Representative of the present approach of the courts to the implied duress doctrine is *City of Franklin* v. *Coleman Bros. Corp.,* 152 F.2d 527 (1st Cir. 1945), *cert. denied,* 328 U.S. 844 (1946). This case involved a New Hampshire taxpayer who, without being threatened by enforcement of the tax laws, paid local taxes in 1940 and 1941 and sent a protest letter accompanying each payment. No taxes were assessed in 1942 or 1943, but suit to recover the taxes was not brought until May of 1944. As in the instant case, the illegality of the tax was not at issue, since the city

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[2] In *Mahnomen County* v. *United States,* 319 U.S. 474 (1943), this Court found voluntary payments and denied recovery. The illegal taxes were paid from 1911 to 1927, but there was no allegation, stipulation or finding that the taxes were involuntarily paid. In fact, it appeared that the taxes were voluntarily paid, by the taxpayer and others similarly situated, to keep the county government viable. Also, the taxpayer and the county had reached a settlement for a portion of the questioned taxes in 1936. The suit for the balance of taxes was not brought until 1940. On this combination of unique facts, the Court found the tax payments voluntary and denied recovery.

conceded that it had no jurisdiction to levy the original taxes.

Because the city could have taken summary action against the plaintiff's property and could have charged interest if the payments were not made, the Court of Appeals held that the taxes were not paid voluntarily, but were paid in contemplation of the law and thus under implied duress. The plaintiff was allowed to recover both taxes and interest.

Later cases finding duress from anticipation of penalties, business disruptions, or just bad publicity which could result from failure to pay taxes, include *District of Columbia* v. *Brady,* 288 F.2d 108 (D.C. Cir. 1960), *District of Columbia* v. *American Security & Trust Co.,* 202 F.2d 21 (D.C. Cir. 1953), *Manufacturers Casualty Ins. Co.* v. *Kansas City,* 330 S.W.2d 263 (Mo. 1959), and *S.S. Kresge Co* v. *Howard,* 357 Mo. 302, 208 S.W.2d 247 (1948). In *Manufacturers Casualty,* there was a stipulation that the taxpayer had neither protested nor otherwise indicated the belief that it did not owe the tax at the time of the payment, nor did it indicate the converse. Nevertheless, contemplation of a penalty was still held sufficient for a finding of duress.

In *Kresge,* after surveying the current state of the law, the Missouri Supreme Court said:

> "However, courts are now taking a more liberal view as to whether certain types of taxes are ever in fact voluntarily paid since the urgent and immediate payment of them is compelled in order to avoid harsh penalties imposed for non-payment. The compulsion brought about by such penalties creates what the writers have termed technical or implied duress sufficient to make the payment of such taxes involuntary." 357 Mo. at 307, 208 S.W.2d at 250.

The implied duress in the instant case is equal to or greater than that found in *City of Franklin* and the other cases cited above.

The penalties threatened by New Hampshire, for failure to make payments demanded by the Commuters Income Tax, were substantial. Individuals faced fines of up to $2,000 and imprisonment of up to one year. N.H. Rev. Stat. Ann. ch 77-B:23. Corporations faced the same penalties as individuals and, in addition, were required to withhold taxes (N.H. Rev. Stat. Ann. ch. 77-B:10 *et seq.*), were made liable to pay taxes withheld from individual employees (N.H. Rev. Stat. Ann. ch. 77-B:10 and 11), had their property subjected to liens for the amount of withheld taxes owed (N.H. Rev. Stat. Ann. ch. 77-B:14), and were subject to foreclosure of the liens if such taxes were not paid (N.H. Rev. Stat. Ann. ch 77-B:16). In practical terms, duress was imposed through a very direct threat to the continued employment of the commuters, buttressed by strong threats to their employers.

In addition, the New Hampshire Tax had a feature — withholding — above and beyond all prior implied duress cases. All the previously cited cases required some action initiated by the taxpayer to achieve payment. In New Hampshire, withholding was an automatic result of employment. Not only would failure to file a return result in penalties, but in futility as well.

Any taxpayer resisting withholding would have risked trouble with his or her employer and immediately would have faced the severe penalties imposed by New Hampshire law. Considering that the amounts of money assessed against each individual taxpayer were small, that the taxpayers wanted to avoid difficulties with their employers, and that the taxpayer could charge off all of the New Hampshire tax as a credit against the home state tax,

only a taxpayer with considerable personal initiative and conviction would have dared to refuse to pay the tax.

Even a formal or informal protest is not necessary where an invalid tax is assessed and paid under duress or implied duress. *Manufacturers Casualty Ins. Co.* v. *Kansas City,* 330 S.W.2d 263 (Mo. 1959); *S.S. Kresge Co.* v. *Howard,* 357 Mo. 302, 208 S.W.2d 247 (1948). Where the validity of a tax is attacked, the normal protest and tax abatement processes are neither required nor appropriate. Instead, the taxpayer's remedy is a direct resort to the courts under common law doctrines of law and equity, as is being pursued in this case. *District of Columbia* v. *Brady,* 288 F.2d 108 (D.C. Cir. 1960); *City of Franklin* v. *Coleman Bros. Corp.,* 152 F.2d 527 (1st Cir. 1945), *cert. denied,* 328 U.S. 844 (1946).

The New Hampshire Tax became effective in 1970. Many residents of Maine, New Hampshire and Massachusetts protested the payment to and the withholding of taxes by New Hampshire from that date. These informal protests continued until and after December 6, 1971, when the suit was initially filed which led to the decision in *Austin* v. *New Hampshire,* 43 U.S.L.W. 4400 (U.S. March 19, 1975). That suit constituted an effective protest of taxes previously paid and of all taxes which continued to be paid until the decision of this Court, ruling the tax illegal on March 19, 1975. Thus, from December 6, 1971, New Hampshire was on notice of a formal protest, at least as to all residents of the State of Maine who were paying the New Hampshire Commuters Income Tax. Further, as indicated above, since a protest is not needed to retain a right to repayment of taxes paid under implied duress, the plaintiff States are entitled to recovery of all taxes paid by their residents, whether protested or not, since the effective date of the New Hampshire Tax, July 1, 1970.

The duress on payment of the Commuters Income Tax to the State of New Hampshire, or certainly implied duress, is clearly established. With duress established, Plaintiffs, as the real parties in interest, are entitled to recovery of all tax funds wrongfully diverted to the State of New Hampshire under the unconstitutional and illegal New Hampshire Commuters Income Tax.

E. *Plaintiffs Are Entitled To Relief, Even Absent Duress.*

Having shown the duress which was inherent in the imposition and enforcement of the New Hampshire tax, we must emphasize that proof of duress (or implied duress) should not be required as a prerequisite for recovery in this case.

The common law rule denying recovery of illegal taxes which were voluntarily paid had a rationale based on four points: (1) principles of sovereign immunity; (2) the difficulty of determining the class of persons harmed; (3) the futility of granting recovery, since the successful plaintiffs themselves would have to absorb the cost of a judgment, as taxpayers of the defendant jurisdiction; and (4) the personal liability of local assessors to repay illegal taxes, which led courts to charge both assessors and taxpayers with knowledge of the law at time of payment. (*See generally, San Francisco & N. R. Co.* v. *Dinwiddie,* 13 Fed. 789 (Cal. Cir. 1882); *Dupre* v. *Opelousas,* 161 La. 272, 108 So. 479 (1926)).

These historical factors are not applicable to the case at bar.

(1) There is no sovereign immunity here. Sovereign immunity as against another State was relinquished by ratification of the United States Constitution, when the States, through Article III, § 2, effectively consented to

suits by other States. *Principality of Monaco* v. *State of Mississippi*, 292 U.S. 313, 328 (1934); *Virginia* v. *West Virginia*, 246 U.S. 565 (1918).

(2) There is no difficulty determining who has been harmed by New Hampshire's actions. But for the New Hampshire tax, Maine, Massachusetts and Vermont would have had approximately $13.5 million in additional funds for their state treasuries.

(3) Unlike the common law cases, the taxpayers who benefited from the illegal tax, who now would absorb the cost of a judgment allowing recovery, do not reside in the same jurisdiction as the taxpayers upon whom the burden of the illegal tax fell. The jurisdiction benefitted and the jurisdictions harmed by the illegal tax are separate and distinct. The governmental entity which was unjustly enriched by the illegal tax and the entity which was harmed are clearly identifiable and separate.

(4) There is no intimation that individual tax assessors may incur liability. This is a matter between States and this Court has the authority to impose a judgment upon and to require payment from the defendant State. *Virginia* v. *West Virginia*, 246 U.S. 565 (1918).

Thus, there is no requirement that the payments involved be determined involuntary, for Plaintiffs to recover.

IV. Plaintiffs Are Entitled to Interest

New Hampshire has long recognized that interest should be paid on taxes which were wrongfully collected. In *Boston & Maine R. Co.* v. *State*, 63 N.H. 571, 573, 4 Atl. 571, 572 (1886), a tax abatement proceeding, the New Hampshire Supreme Court allowed recovery of interest on back taxes at a rate of 6%, holding that:

> "It is not just that a taxpayer should be compelled to bear more than his share of the public expense. He would bear more than his share if he lost and the public gained a year's use of an excess by him paid. It could not have been the intention to impose an unjust loss of a year's interest. Justice requires that there should be an equitable adjustment of that loss. In actions at common law, involving like questions, interest would be allowed as part of the damages, and we think it should be in this case."

Accord, City of Franklin v. *Coleman Bros. Corp.*, 152 F.2d 527 (1st Cir. 1945), *cert. denied*, 328 U.S. 844 (1946); *Amoskeag Mfg. Co.* v. *Manchester*, 70 N.H. 336, 348, 47 Atl. 74, 76 (1900).

As in *Boston & Maine R. Co.* and *Amoskeag Manufacturing Co.*, the taxes in this case were required to be paid at specific times. They could not be postponed until validity was adjudicated, as was the case in *Kaemmerling* v. *State*, 81 N.H. 405, 128 Atl. 6 (1924), where a request for interest payments was denied on inheritance taxes held to be illegally assessed.

Plaintiffs' demand for interest is consistent with New Hampshire statutory and case law. The Commuters tax statute itself recognizes that interest is payable from the date of payment, on taxes which are unlawfully assessed. N.H. Rev. Stat. Ann. ch. 77-B:21, § III. Payment of interest also would be consistent with *City of Franklin*, where interest payments were allowed in a common law action, on the basis of prior interest payments which had been allowed by the New Hampshire Court under abatement actions. Similarly, *Boston & Maine R. Co.* based its award of interest in an abatement proceeding on common law doctrines.

Thus, Maine, Massachusetts and Vermont are entitled to recover both the principal amount of tax revenues illegally diverted to New Hampshire and the interest thereon. *Cf., Virginia* v. *West Virginia,* 238 U.S. 202 (1915).

Conclusion

The Plaintiff States are the parties which bore the loss from the Commuters Income Tax, have standing to maintain the action, as the real parties in interest, and this Court is the only forum which can grant relief. *Austin* should be applied retroactively to allow the requested relief, as its result was no deviation from past decisions, there is no third party reliance involved, certainly none that lacked notice of the risk, and retroactive application will further the principles of equal treatment and nonretaliation upon which *Austin* was based. Thus, under the normal tax law doctrines, Plaintiffs are fully entitled to recover the sums diverted from their state treasuries, together with interest thereon.

Both the sums involved and the legal issues to be resolved are of significant importance. Plaintiff States' Motion For Leave To File Complaint should be granted or, in the alternative, this Court should summarily grant the relief requested by Plaintiffs, based on the pleadings and briefs submitted.

Dated: August, 1975

Respectfully submitted,

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APPENDIX

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Chapter 77-B

COMMUTERS INCOME TAX

77-B:1 Definitions. As used in this chapter the following terms shall have the following meanings unless the context clearly requires otherwise:

I. "Adjusted gross income" shall mean, for any taxable year, the adjusted gross income as defined in the United States internal revenue code in effect for that taxable year but excluding income which under the code is exempted from taxation by the state.

II. "Commissioner" shall mean the commissioner of revenue administration.

III. "Estimated tax" shall mean the amount which the individual estimates as the amount of the income tax imposed by this chapter for the taxable year, minus the amount which the individual estimates as the sum of any credits against such tax.

IV. "Taxpayer" shall mean any person subject to the provisions of this chapter.

V. "Individual" shall mean a natural person.

VI. "New Hampshire taxable income" shall mean, for any taxable year, taxable income as defined under the United States internal revenue code in effect for that taxable year less any New Hampshire derived income, less an exemption of two thousand dollars and less any taxable business profits taxed pursuant to the business profits tax.

VII. "Person" shall mean any individual.

VIII. "Taxable year" shall mean the calendar or fiscal year, or portion thereof, upon the basis of which the New Hampshire tax is computed.

IX. "Taxable nonresident" shall mean any nonresident of the state whose adjusted gross income that taxable year includes any amount of New Hampshire derived income.

X. "New Hampshire derived income" shall mean, for any taxable year:

(a) rents, royalties and gain derived from the ownership of property within the state;

(b) wages, salaries, fees, commissions or other income received with respect to personal services performed of whatever kind and in whatever form paid derived from activities (1) performed within this state, or (2) performed from a base of operations within this state and not subject to an income tax within the state where the services are performed;

(c) income derived from every business, trade, occupation or profession of the taxpayer to the extent that the business, trade, occupation or profession is carried on within the state. But New Hampshire derived income shall not include any income excluded from adjusted gross income as defined in this section nor any taxable business profits taxed pursuant to the business profits tax.

XI. "Resident" shall mean:

(a) an individual domiciled in the state except one who maintains a permanent place of abode outside the state, does not maintain one within the state and does not spend more than thirty days of the taxable year within the state; or

(b) an individual who maintains a permanent place of abode within the state and spends more than one hundred eighty-three days of the taxable year within the state.

XII. For the purposes of this act, interest, dividends and capital gains received by the taxpayer from the ownership or sale of stock or from a beneficial interest in a trust and all income received by the taxpayer from a retirement system of any kind or from an annuity or other insurance plan shall be deemed to have been earned in the state of residence of said taxpayer.

77-B:2 Tax Imposed.

I. On Residents, Income Earned Outside New Hampshire. A tax is hereby imposed upon every resident of the state, which shall be levied, collected and paid annually at the rate of four percent of their income which is derived outside the state of New Hampshire as defined in RSA 77-B:1 "New Hampshire taxable income;" provided, however, that if such income shall be subject to a tax in the state in which it is derived, such tax shall constitute full satisfaction of the tax hereby imposed; and provided further, that if such income is exempt from taxation because of statutory or constitutional provisions in the state in which it is derived, or because the state in which it is derived does not impose an income tax on such income, it shall be exempt from taxation under this paragraph.

II. On Nonresidents, Income Earned in New Hampshire. A tax is hereby imposed upon every taxable nonresident, which shall be levied, collected and paid annually at the rate of four percent of their New Hampshire derived income as defined in RSA 77-B:1 less an exemption of two thousand dollars; provided, however, that if the tax hereby imposed exceeds the tax which would be imposed upon such income by the state of residence of the taxpayer, if such income were earned in such state, the tax hereby imposed shall be reduced to equal the tax which would be imposed by such other state.

III. Exception. Notwithstanding the provisions of paragraphs I and II, no tax shall be imposed upon salaries paid to men or women in the armed forces of the United States.

77-B:3 When Taxed. The tax imposed by RSA 77-B:2 shall be levied, collected, and paid by the fifteenth of the fourth month following the close of the taxable year.

* * *

77-B:6 Reciprocal Provisions. The commission is authorized to enter with any other state or country a reciprocal agreement in which such other state or country agrees not to impose a personal income tax upon income received by residents of this state and this state agrees not to impose a personal income tax upon income received by residents of such other state or country; provided, however, that such reciprocal agreement shall not become effective until the beginning of the next fiscal biennium after the date of such agreement.

77-B:7 Returns and Refunds of Individuals.

I. A taxpayer shall file a return of his net income for such a period and on such accounting basis as is authorized under the internal revenue code. For each taxable year, returns shall be made to the commission in such form and manner and to such extent as it shall prescribe by regulations, by the following taxpayers:

(a) A resident having for such taxable year any New Hampshire taxable income as defined in RSA 77-B:1; provided, however, that if it shall appear to the satisfaction of the commission that any residents of this state, or class of residents of this state, who are subject to the tax imposed by this act, are liable for tax upon the same income under the law imposed

for the taxable year by another state and are thereby entitled to a credit allowed by section 2 of this chapter against the tax otherwise due under this chapter, the commission shall by regulation relieve such residents or class of residents from being required to make any return under this chapter.

(b) A nonresident having for such taxable year New Hampshire derived income of two thousand dollars or more.

II. A husband and wife may make a single joint return to the commission for a taxable year for which such a return is filed under the laws of the United States. If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer.

III. Whenever a taxpayer shall file a return which shows that his withholding tax or estimated tax exceeds the amount of tax liability due under this chapter, he shall be due a refund and the tax commission shall forthwith certify the amount of said refund to the state treasurer who shall pay the same to the taxpayer; provided, however, that at the option of the taxpayer, said refund may be credited against any tax due from said taxpayer for the succeeding calendar year.

IV. Any refund or credit due a taxpayer pursuant to paragraph III for which said refund or credit is not requested within five years shall be deemed the property of the state of New Hampshire.

* * *

77-B:10 Who Must Withhold. Every employer, as defined under the laws of the United States in effect April 26, 1947, with respect to income tax collected at its source, employing any person liable for a tax pursuant to the

provisions of this chapter shall deduct and withhold upon wages paid to said employee, a tax equal to four percent of such wages subject to the provisions of RSA 77-B:13.

77-B:11 Return of Withheld Taxes. Every employer required to deduct and withhold any tax under RSA 77-B:10 shall make return thereof to the commission on or before February fifteenth in each year and shall pay quarterly the tax withheld to the commission, provided, however, that the commission may, if such action is necessary in any emergency where collection of the tax may be in jeopardy, require such employer to make such return and pay such tax at any time, or from time to time.

77-B:12 Employer's Liability. Every employer required to deduct and withhold a tax under RSA 77-B:10 is hereby made liable for such tax and is hereby indemnified against the claims and demands of any individual, corporation or partnership for the amount of any payments made in accordance with the provisions of this chapter.

77-B:13 Use of Withholding Tables. At the election of the employer with respect to such employee, the employer may deduct and withhold upon the wages paid to such employee a tax determined on the basis of tables to be prepared and furnished by the commission, which tax shall be substantially equivalent to the tax provided in RSA 77-B:10 and which shall be in lieu of the tax required in such section.

77-B:14 Amount of Withheld Taxes as Lien Against Employer. If any employer required to deduct and withhold a tax under RSA 77-B:10 neglects or refuses to pay the same after demand, the amount, including interest

after such demand, together with any costs that may accrue in addition thereto, shall be a lien in favor of the state of New Hampshire upon all property and rights to property, whether real or personal, belonging to such employer. Such lien shall arise at the time the assessment and demand is made by the commission and shall continue until the liability for such sum, with interests and costs, is satisfied or becomes unenforceable. Such lien shall be valid as against any subsequent mortgagee, pledgee, purchaser or judgment creditor when notice of such lien and the sum due has been filed by the commission with the clerk of the town or city in which the property subject to the lien is situated, or, in the case of an unorganized town or grant, in the office of the register of deeds for the county wherein such property is situated. In the case of any prior mortgage on real or personal property so written as to secure a present debt and also future advances by the mortgagee to the mortgagor, the lien herein provided, when notice thereof has been filed in the proper clerk's office, shall be subject to such prior mortgage unless the commission also notifies the mortgagee of the recording of such lien in writing, in which case any indebtedness thereafter created from mortgagor to mortgagee shall be junior to the lien herein provided for.

77-B:15 Release of Lien. The commission shall issue and record a certificate of release of the lien if:

I. The commission finds that the liability for the amount assessed and demanded, together with interest and costs, has been satisfied or has become unenforceable; or

II. There is furnished to the commission a bond with surety approved by the commission in a penal sum sufficient to equal the sum assessed and demanded, together with interest and costs, said bond to be conditioned upon the

payment of any judgment rendered in proceedings regularly instituted by the commission to enforce collection thereof at law.

77-B:16 Foreclosure of Lien. The lien provided for by RSA 77-B:14 may be foreclosed in the case of real estate agreeably with the provisions of law relating to foreclosure of mortgages on real estate, and in the case of personal property, agreeably with the provisions of law relating to the foreclosure of chattel mortgages.

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77-B:21 Adjustments; Procedure. The commission is empowered to determine whether there has been error in the assessment of the tax imposed by this chapter, in accordance with the following provisions:

I. The taxpayer may demand such a determination, in writing, within three years after the tax was due or paid, whichever is later;

II. The commission may, on its own motion, undertake such a determination upon written notice to the taxpayer given within three years after the tax was due or paid, whichever is later.

III. After hearing, if requested by the taxpayer, the commission shall affirm or shall increase or decrease the tax theretofore assessed. Any increase ordered by the commission shall be assessed against the taxpayer and shall carry ten percent interest from the date originally due. Any decrease ordered by the commission shall, with ten percent interest from the date the tax was paid, be credited against any unpaid tax then due from the taxpayer and any balance due the taxpayer shall be certified to the state treasurer who shall pay the balance to the taxpayer, but such credit and payment together may not exceed the amount of the tax originally paid, plus interest.

77-B:22 Appeal. Within thirty days after notice of any adjustment of a tax by the commissioner under RSA 77-B:21, a taxpayer may appeal the commissioner's determination either by written application to the board of taxation or by petition to the superior court in the county in which the taxpayer resides or, if not a resident, in the county where he has a place of business or resident agent. The board of taxation or the superior court, as the case may be, shall determine the correctness of the commissioner's action de novo.

MISCELLANEOUS PROVISIONS

77-B:23 Penalty. Whoever violates any of the provisions of RSA 77-B shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person.

77-B:24 Disposal of Revenue. The revenue received from this tax, after paying the expense of administrating this chapter shall be paid into the general fund.

• • •

77-B:27 Preference. The taxes and interest imposed by this chapter have preference in any distribution of the assets of the taxpayer, whether in insolvency or otherwise.

77-B:28 Dissolution of Corporations. No corporation organized under any law of this state may be dissolved until all taxes and interest required to be withheld by said corporation under this chapter have been fully paid. The secretary of state shall not issue a certificate of dissolution, and no decree of dissolution shall be signed in any court without a certificate from the commission that no taxes and interest imposed by this chapter are due and unpaid.

MAINE INCOME TAX CREDIT LAW

(36 ME. REV. STAT. ANN. § 5127)

§ 5127. Credit for Income tax paid to another state

1. *Resident individual.* A resident individual shall be allowed a credit against the tax otherwise due under this part for the amount of any income tax imposed on him for the taxable year by another state of the United States or a political subdivision thereof or the District of Columbia on income derived from sources therein and which is also subject to tax under this part.

2. *Limitation on credit.* The credit provided under this section shall not exceed the proportion of the tax otherwise due under this part that the amount of the taxpayer's adjusted gross income derived from sources in the other taxing jurisdiction bears to his entire adjusted gross income as modified by this part.

MASSACHUSETTS INCOME TAX CREDIT LAW

(MASS. GEN. L. ANN., CH. 62, § 6A)

§ 6A. Credit for taxes paid to other states

A credit shall be allowed against taxes imposed on business income, as defined in section six to a resident for taxes due any other state, any territory or dependency of the United States, or the Dominion of Canada or any of the provinces thereof, on account of that part of such income received or accrued from sources therein subject to the following restrictions and limitations: (*a*) If the credit allowed by this section is claimed, the deduction specified in subsection (*c*) of section six for taxes paid to any other state, to any territory or dependency of the

United States, or to the Dominion of Canada or any of the provinces thereof shall not be allowed. (*b*) The amount of taxes due on such income shall exclude interest and penalties. (*c*) The amount of the credit shall be the lesser of the following: (1) the amount of such taxes due, or (2) the result of a fraction, whose numerator is the total amount of all items of such income so taxed and whose denominator is the total amount of all items of such income, multiplied by the tax computed on income defined in section six.

VERMONT INCOME TAX CREDIT LAW

(VT. STAT ANN., CH. 151, § 5825)

§ 5825. Credit for foreign taxes

A taxpayer of this state who was a resident individual, estate or trust during any portion of a taxable year shall receive credit against the tax imposed, for that taxable year, by section 5822 of this title for taxes imposed by, and paid to, another state or territory of the United States, or the District of Columbia, upon his income derived from sources within that state, territory or district during that portion of that taxable year.

April 11, 1970

The Honorable Samuel Reddy, Jr., Chairman
House Ways and Means Committee
House of Representatives
State House
Concord, New Hampshire 03301

Dear Sam:

Enclosed please find an amendment to House Bill 41, An Act imposing a tax on certain incomes. This amend-

ment strikes out everything after the enacting clause and replaces it with a new draft of the bill which is designed to meet the objections raised to the original bill.

Because of the complexity of the bill, I would like to explain some of the major provisions.

Generally, this bill is designed to impose an income tax on nonresidents on income earned in this state. This is a somewhat reciprocal tax as all of our neighboring states impose a tax upon New Hampshire residents who work within their respective borders. The intent of this bill is not to tax any resident of this state and it is my belief that the bill, as drawn in this amendment, will not tax any New Hampshire residents. However, in order to make this tax meet constitutional requirements, it is necessary for us to impose a tax in the first instance upon residents as well as nonresidents.

An examination of RSA 77-A:2, I, discloses that while a tax is imposed upon every resident of the state upon their income which is derived outside of the State of New Hampshire, a credit is given for any tax paid to the state in which such income is derived which will fully satisfy the tax imposed by this section. In most cases, this provision will exempt income earned outside of New Hampshire by New Hampshire residents from being taxed. However, cases in which residents of New Hampshire earn income either in states which do not impose an income tax or in states which while imposing an income tax exempt the particular income of such persons from taxation (such as airline pilots) so that no credit would be allowed; such income is also exempted from taxation under the second proviso of this paragraph. The net result is that no New Hampshire resident will be required to pay a tax.

Perhaps I should indicate at this point that it is specifically provided by RSA 77-A:1, XIII that interest, dividends, capital gains and income from retirement systems

and trusts shall be deemed to be earned in the state of residence of the taxpayer so that this income for New Hampshire residents will not be deemed as income "derived outside the State of New Hampshire" and, therefore, will not be subject to the tax imposed by this act.

As to nonresidents, RSA 77-A:2, II, provides that they shall pay a tax of 4 per cent of their income earned within the State of New Hampshire. It further provides that in cases where nonresidents are taxed by their home state and such tax is at a rate of less than 4 per cent, the tax hereby imposed shall be reduced to equal the amount of the tax which would be imposed by the taxpayer's home state. The significance of this provision is that no nonresident will thus be required to pay more tax to New Hampshire than to his home state and he, therefore, will have no reason to question the validity of this tax. The end result of the tax imposed by this bill will be, therefore, to give to the State of New Hampshire most of the tax collected by our neighboring states on their residents on income earned within the State of New Hampshire without putting an additional burden on any individual taxpayer.

Two of the major definitions contained in this bill are the terms "New Hampshire derived income" and "New Hampshire taxable income" because these are the determining factors in computing the amount of the tax imposed by this bill.

"New Hampshire derived income" (section 77-A:1, X) is defined to include all wages, rents, royalties or other gain derived from sources within this state or derived from services performed from a base of operations within this state and not subject to a tax in another state. This is the amount, less $2,000.00 exemption, upon which the nonresident's tax is to be computed.

The term "New Hampshire taxable income" (section 77-A:1, VI) is defined as a taxable income of the taxpayer

as defined under the United States Internal Revenue Code for that taxable year less any New Hampshire derived income and less a $2,000.00 exemption. The effect of this definition is to exclude all income earned by the taxpayer in the State of New Hampshire. When this is taken together with the credit and exemption provisions mentioned above in RSA 77-A:2, I, the end result is that no New Hampshire resident will be required to pay a tax.

I would like to call your attention to section 77-A:6 which authorizes the Tax Commission to enter reciprocal agreements with other states. Under the terms of such agreements, the State of New Hampshire could agree not to tax residents of such other states in return for which the other states would agree not to tax the residents of this state. If such an agreement could be reached, the residents of this state working in such other states would then be relieved from taxation because such income "derived outside the State of New Hampshire" would then be exempt from taxation under the provisions of RSA 77-A:2, I. This section is written in accord with the recommendations of the Citizens Task Force at pages 48 and 49, copies of which I am attaching to this letter.

You will note that if such a reciprocal agreement could be entered into it will not be effective until the beginning of the biennium following the date of agreement. The purpose of this is to protect the integrity of the revenue estimates upon which appropriations have been made.

I hope the information contained in this letter will be of some help to you in your examination and consideration of this bill. I would be happy to meet with you and your Committee at any time to further explain this bill.

Very truly yours,
Richard A. Hampe
Attorney

PART IV. MINORITY REPORT

by

Senator Elmer T. Bourque

This minority report is written to express concern with certain aspects of the report of the Executive Committee. My disagreement is primarily in the areas of revenue and fiscal policy.

Citizens Task Force

House Bill I, which established the Citizens Task Force, contained an appropriation of $190,000. I voted against this measure in the State Senate because I doubted that the State would derive any substantial benefit from the money spent. I am now convinced that my vote was in error, and that immediate savings to be realized on implementation of certain recommendations of the Executive Committee will more than repay the State for the investment made.

Savings

Executive Committee recommendations in the areas of improved manpower practices, procurement, communications and fleet management practices and its proposal to close Glencliff Sanatorium will, if implemented, save the State upwards of $3,000,000 a year. (See Exhibit 4) One economy proposed by the Executive Committee is the curtailment of reimbursement of State employees for out-of-town meals. I am not convinced of the desirability of this proposal. Even without this, substantial savings are indicated.

Executive Reorganization

State employees and officials, members of the General Court, former chief executives and others involved in State government know that the Governor's office is, and for many years has been, woefully understaffed. As the Chief Executive Officer of the State, elected by the people to run State government, the Governor must be given the

tools and staff to do the job. To do the job properly, he must have more than a general knowledge of the operation of State departments and agencies. To insure maximum efficiency in State government, the Governor must have the staff to enable him to oversee departmental operations in far more detail than he can at present.

While I cannot support all aspects of the proposed reorganization of the executive departments of government, I do enthusiastically support proposals to increase the Governor's staff. Although a considerable expenditure is involved, it is my feeling that in the long run new savings will result.

Comments on Proposed Tax Changes

The Executive Committee recommends increases in the Pari-Mutuel and Tobacco Taxes representing a projected revenue gain of $4,100,000 for the present biennium. In addition, the Committee proposes the following:

- Enactment of a Business Profits Tax
- Enactment of a Non-Resident Income Tax
- Exemption of lineal descendents from the Legacy Tax
- Repeal of Taxes on Stock-in-Trade, factory machinery, road building and construction machinery, portable mills and animals. (These taxes are presently collected by the cities which will be reimbursed by the State for the loss of these revenues at the 1969 level.)

Task Force estimates for the present biennium under the present operating budget and tax structure project a relatively small deficit of $200,000 (See Table I). Enactment of the Business profits and Non-Resident Income taxes coupled with repeal of the Stock-in-Trade and other related taxes, and coupled also with revision of the legacy tax to exclude lineal descendants, would produce an estimated $2,400,000 in new revenue for this biennium. I am

opposed to these recommended tax changes for the following reasons:

1. *The Constitutionality of the Non-Resident Income Tax is in Doubt:*

Information available to the Executive Committee left a doubt as to the constitutionality of the Non-Resident Income Tax. Should this measure be declared unconstitutional, the $2,400,000 revenue gain referred to in the preceding paragraph would shrink to $700,000. In terms of the overall tax and spending proposals of the Executive Committee, it could mean a $700,000 deficit for this biennium.

2. *The Business Profits Tax is Unfair and Discriminatory:*

The Executive Committee cites three standards for the analysis of a tax or tax structure, the first of which is:

> "Its fairness — it should not place an undue burden on one segment of the population."

I can't conceive how, by any stretch of the imagination, the Business Profits Tax meets this standard.

At first glance, it might seem that the new tax is directed primarily at large corporations, big businesses, doctors, dentists, lawyers and other professional men. However, the scope of the new tax is far greater. The proposed Business Profits Tax would seem to apply to anyone running a business. The tax would apply to practically everyone listed in the yellow pages of the telephone book. The implications of this in terms of "fairness" are obvious.

Is it fair that the owners of barber shops, beauty salons, grocery stores and drug stores be required to pay a tax which does not apply to the salaried president of an insurance company? Should the owners of filling stations, insurance agencies, restaurants and nursing homes be asked to pay a tax which does not apply to salaried state officials or college professors? Should farmers be taxed while bank

presidents are not? Should a self-employed television repairman, electrician, tailor, dressmaker, plumber, upholsterer or cobbler be asked to pay a tax without asking a corporate executive to do likewise? I think not. In my judgment, this tax is unfair and should not be enacted.

3. *Repeal of the Stock-in Trade Tax Could Result in Higher Property Taxes:*

The Executive Committee proposes that the municipalities be reimbursed for revenue losses resulting from repeal of the Stock-in Trade Tax in amounts based upon the yield from this tax in the year 1969. If the present inflationary trend continues, it is clear that in future years payments by the State to the municipalities will not be sufficient to offset the revenue loss occasioned by repeal of the Stock-in Trade Tax. It has been suggested that the difference will be made up by assisting the municipalities in other ways. There is no guaranty of this, however, and if such additional assistance is not forthcoming, there will be an inevitable increase in property taxes.

One question of considerable importance should be considered: Will the proposed Business Profits Tax raise the $22,800,000 which is anticipated for this biennium and if not, what will the consequences be? I have serious reservations as to whether revenue from this tax will approach the estimates. If this concern is well founded, the State could find itself in a financial crisis of major proportions in the present biennium.

With respect to the next biennium, the Executive Committee projects a general fund deficit of $15,900,000. I feel that this projection may be unduly pessimistic. The Legislature will meet in regular session before the beginning of the next biennium and I would suggest that a more realistic appraisal of the State's financial position can be made at that time.

In summary, I am opposed to the tax reform proposal made by the Executive Committee. I feel that proposed Business Profits Tax is unfair and discriminatory and I fear that enactment of the tax reform package could result in financial chaos during the present biennium. As far as the next biennium is concerned, I would prefer waiting until the next regular session of the Legislature rather than taking hasty action at the present time.

Comments on Proposed Priority Spending

The Executive Committee recommends that at the special session of the Legislature money be appropriated in the following areas: (1) Revised Salary Grade Structure and Classification System; (2) Improved Fringe Benefits for career employees and; (3) Advertisement of Job Vacancies. The estimated cost is between $400,000 and $1,200,000. (See Table III)

The Executive Committee, in addition, recommends special session spending in designated amounts for the following: Special Education, Vocational Education, Aid to Non-Public Schools, Foundation Aid, Water Pollution, Air Pollution, Aid to Families with Dependent Children, Mental Health, Nursing and County Homes, Rehabilitation Centers and the State Hospital. The total appropriation would be in excess of $8,050,000. (See Table IV)

Adoption of the foregoing spending proposals would virtually wipe out the savings and revenue gains anticipated by the Executive Committee. While additional spending may be indicated in some of the categories enumerated above, I am not convinced that it is required in all of the categories, nor am I convinced of the reasonableness of the proposed expenditures in the individual categories. A determination of the need for additional spending can best be made by the Legislature after hearing before the appropriate legislative committees.

Comments on Other Recommendations

It would be impractical to comment on all Executive Committee recommendations in this minority report. There are several areas, however, where I feel comment is indicated.

1. *Four-year Term for Governor:* I lean toward a four-year term for the Governor, but am not entirely convinced. Arguments made by the Executive Committee are cogent, but I am troubled by the fact that this proposal takes government one step farther away from the people. While it is true that two years may be too short for a good Governor to implement his program, it also must be recognized that four years may be too long with a poor Governor in office.

2. *Counsel to the Governor:* The Governor should have legal guidance in the performance of his every day duties. I feel, however, that the duties of the Counsel to the Governor should be carefully defined and that caution be exercised in any encroachment on the traditional powers of the Attorney General.

3. *Legislature:* I favor annual sessions, but oppose reducing the size of the General Court.

4. *Executive Council:* I feel that the Executive Council plays an important role in our system of checks and balances. While it may be that certain minor administrative matters now handled by the Governor and Council could more properly be handled elsewhere, I would strongly oppose abolition of the Council or erosion of its fundamental powers.

Conclusion

I would caution against the adoption of what I consider to be unsound revenue and fiscal proposals. New Hampshire presently enjoys a tax structure which visitors from other states regard with envy. Through efficiency and

thrift, this State has been able to maintain this tax structure and, at the same time, provide a relatively high level of services to the people. I fear that adoption of the tax reform and spending proposals will undermine our ability to maintain this tax structure in the future.

I wish to emphasize my belief that the Task Force has rendered a valuable service to the State of New Hampshire and that substantial savings will result from certain Executive Committee recommendations. I have enjoyed the many hours spent deliberating with my dedicated colleagues on the Executive Committee. The people of the State owe a debt of thanks to the Task Force Staff and to the hundreds of volunteer citizens who participated in the study.

(s) Elmer T. Bourque
N.H. Senate District #17
Manchester, N.H.

Important Please Read
Special Message
Administrative Ruling Business Profits Tax Division
RSA Chapter 77-B

Effective March 19, 1975, employers are to cease withholding New Hampshire commuters non-resident income tax.

Commuters Income Tax which was withheld up through March 18, 1975, is to be remitted to the Business Profit Tax Division in the normal course on or before the due date of the first quarter return which is April 30, 1975.
March 26, 1975, New Hampshire Business Profit Tax Ruling No. 3 77-B

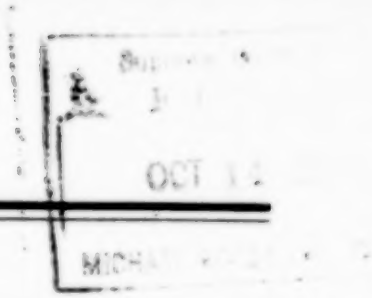
State of New Hampshire
Department of Revenue Administration
Concord, 03301

[seal]
LLOYD M. PRICE
COMMISSIONER

Date:
Tax Period Ended:

Dear Taxpayer:
We have received your claim for refund of Commuter Income Tax paid by you for the above period. This claim was based upon the March 19, 1975 U.S. Supreme Court decision declaring the tax unconstitutional.
The Department of Revenue Administration at this time believes that the law does not require a refund of this tax for any taxable period prior to March 19, 1975. However, the issue is under study at this time, so we will not act on your claim until the question has been resolved, perhaps by litigation. Since you have filed your claim your rights are protected and should the decision be in your favor, we will refund any overpayment due you. If the decision is not in your favor, we will disallow your claim.

Very truly yours,
(s) Lloyd M. Price
Lloyd M. Price
Commissioner



In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 69 Original

STATE OF MAINE,
COMMONWEALTH OF MASSACHUSETTS,
AND
STATE OF VERMONT,
Plaintiffs

v.

STATE OF NEW HAMPSHIRE,
Defendant

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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In The

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OCTOBER TERM, 1975

No. 69 Original

STATE OF MAINE,
COMMONWEALTH OF MASSACHUSETTS,
AND
STATE OF VERMONT,
Plaintiffs

v.

STATE OF NEW HAMPSHIRE,
Defendant

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

JURISDICTION

This Complaint is brought by the State of Maine, the Commonwealth of Massachusetts, and the State of Vermont against the State of New Hampshire, and asserts the jurisdiction of this Court under Article III, Section 2 of the Constitution of the United States and 28 U.S.C. §1251, over a controversy between two or more states.

STATUTES INVOLVED

The statutes involved are set out at length in the Appendix to the Brief Supporting Motion for Leave to File Complaint.

QUESTIONS PRESENTED

The questions presented by the Motion for Leave to File Complaint are

(1) whether this action to litigate and collect refund claims, allegedly accruing to certain citizens of the plaintiff states as a consequence of this Court's decision in *Austin v. New Hampshire*, 43 U.S.L.W. 4400 (March 19, 1975), may be brought under the original jurisdiction of this Court as a controversy between two or more states; and

(2) assuming *arguendo* that such an action is technically within the original jurisdiction of this Court, whether this Court should grant leave to file this complaint, even though the plaintiffs have had the power, for the entire duration of the alleged injurious conduct of the defendant, to prevent completely those consequences of that conduct which they now assign as injury to themselves as entities apart from their citizens.

STATEMENT OF THE CASE

On March 19, 1975, this Court held unconstitutional the New Hampshire Commuters Income Tax, New Hampshire Revised Statutes Annotated [RSA] Chapter 77-B, at the suit of three residents of Maine who were taxpayers under the New Hampshire statute. That action began as a petition for declaratory relief and refund in the New Hampshire State courts. The New Hampshire Supreme Court found standing in the taxpayers to challenge the constitutionality of the statute, but held against the plaintiffs on the basis of a lack of substantial demonstrated injury in fact, and so had no occasion to consider further the claims for relief. *Austin v. State Tax Commission*, 114 N.H. 137, 316 A. 2d 165 (1974).

On appeal, this Court reversed, *Austin v. State of New Hampshire*, No. 73-2060, 43 U.S.L.W. 4400 (March 19, 1975), finding a violation of the Privileges and Immunities Clause notwithstanding the position of fiscal indifference of the taxpayer, and held that the constitutionality of the New Hampshire statute could not depend upon the present configuration of Maine statutes. Subsequent references herein "*Austin v. New Hampshire, supra*", or "*Austin*", are to the decision of this Court in No. 73—2060.

In response to this Court's decision, the State of New Hampshire ceased all activity under RSA 77-B prospectively, effective March 19, 1975. Employers required to withhold income were instructed to cease withholding as of that date, and to file and remit in the ordinary course for periods prior to that date, so that the operation of the tax might be wound up on a date certain with respect to all affected persons. Admin. Ruling No. 3 77-B, March 26, 1975 (Pl. Brief Supporting Motion for Leave to File, App., p. 72). In addition, every taxpayer concerned enough to inquire was treated as having requested a refund, and was informed that his or her claim had been received and recorded, but that the State was neither allowing nor denying the claim at that time, pending study of the entire matter and possible litigation by individual claimants. New Hampshire Department of Revenue Administration Form Letter (Pl. Brief, App., p. 73).

The Department of Revenue Administration, apart from the instructions to employers mentioned above regarding cessation and winding up, has taken no action to collect funds from any party, and has in fact, received and refunded payments voluntarily made for periods after March 19, 1975.

Conversely, no party has yet sought the aid of the New Hampshire Supreme Court, to which the *Austin* case was remanded for further proceedings, in securing specific relief grounded upon the invalidity of the tax. Rather, Massachusetts has sent notices to all of its residents who received credit for taxes paid to New Hampshire, informing them of Massachusetts' intention to assess and recover from them all amounts allowed as credit for taxes paid under the New Hampshire Commuters Income Tax, and offering a full discharge from that liability to Massachusetts in return for an assignment of any rights the taxpayer might have to recovery of the amounts paid to New Hampshire. The text of these notices, and of a form, also supplied, on which the assignment could be made, are appended to this brief.

This action, consisting of a Motion for Leave to File Complaint, and Complaint, was then brought, and was docketed on August 13, 1975 as No. 69 original.

BEST COPY AVAILABLE

SUMMARY OF ARGUMENT

This complaint is not within the original jurisdiction of the Supreme Court. Although nominally titled a suit between states, as a claim by the plaintiffs to a recovery for an alleged injury, the complaint fails to demonstrate that the defendant state is the direct cause of that injury, since the alleged injury is entirely a consequence of the plaintiffs' own statutes. As a claim that the conduct of the defendant New Hampshire has wronged someone, for example, citizens of the plaintiff states, the complaint is an attempt to litigate that claim on behalf of such other parties. In either event, the complaint fails to state an actual controversy between states, and is not within the original jurisdiction of this Court.

Given the nature of the subject matter of the claim, the former taxpayers under the New Hampshire Commuters Income Tax are indispensable parties, as their rights should not be settled here without their presence; yet their presence as defendants would oust the jurisdiction of this Court.

The plaintiffs here are barred by the doctrine of laches from now seeking recovery for an alleged injury which they each had full power to prevent, and may not now use this Court as an alternative forum.

Finally, the plaintiffs' claim-in-chief, apart from being outside the original jurisdiction of this Court, is simply without merit. There is no occasion demonstrated for retroactive application of *Austin v. New Hampshire, supra*, given the known circumstances of the enactment and subsequent history of the Commuters Income Tax. Any further evidence, if elicited, would merely confirm the wisdom of non-retroactive application of *Austin*.

ARGUMENT

I.

THE COMPLAINT DOES NOT STATE A CLAIM WITHIN THE ORIGINAL JURISDICTION OF THE SUPREME COURT.

A. The Grant of Original Jurisdiction.

The power of the federal judiciary is derived from Article III of the Constitution of the United States. The scope of that power, and the manner in which it may be exercised, are delineated in Section Two thereof. "The judicial power shall extend . . .to controversies between two or more states. . . ." U.S. Const., Art. III, §2, cl. 1. Thus, an actual controversy in the constitutional sense is an indispensable requisite for assumption of jurisdiction by this Court, and that requirement may not be avoided by the mere appearance of states as nominal parties plaintiff and defendant. *Massachusetts v. Mellon*, 262 U.S. 447 (1923); *Texas v. Florida*, 306 U.S. 398 (1939); and *Massachusetts v. Missouri*, 308 U.S. 1 (1939).

The provision in Article III, §2, Clause 2 that in cases "in which a state shall be a party, the Supreme Court shall have original jurisdiction" does not operate to enlarge the Supreme Court's jurisdiction beyond that set out in the basic grant. "The effect of [Art. III, §2, cl. 2] is not to confer jurisdiction upon the court merely because a state is a party, but only where it is a party to a proceeding of judicial cognizance. Proceedings not of a justiciable character are outside the contemplation of the constitutional grant". *Massachusetts v. Mellon*, *supra* at 480.

To constitute a justiciable controversy, "it must appear that the complaining state has suffered a wrong through the action of the other state, furnishing ground for judicial redress, or is asserting a right against the other state which is susceptible to judicial enforcement according to accepted principles of the common law or equity systems of jurisprudence". *Massachusetts v. Missouri, supra* at 15; *Florida v. Mellon*, 273 U.S. 12 (1927).

B. **The Complaint Does Not Present A Controversy Between States.**

The two-part test for the existence of a justiciable controversy voiced in *Massachusetts v. Missouri* and *Florida v. Mellon, supra*, provides a convenient and revealing basis for analysis of the instant complaint. Assuming *arguendo* that the loss of tax revenue of which the plaintiffs complain is an injury to them, the complaint, as an attempt to attribute that loss to an action of another state, namely, New Hampshire, fails completely. Similarly, assuming *arguendo* that the specified injurious action of New Hampshire, to wit, collecting taxes in a manner later found unconstitutional, creates a right in someone susceptible of judicial enforcement, the complaint fails to show that the supposed right inheres in the plaintiffs. Thus, the complaint fails to demonstrate the controversy between states required to support the original jurisdiction of this Court. The reasons for that failure are more particularly set out below.

In addition, the two assumptions proferred above for the purpose of argument are each invalid in their own right, as will also be shown below.

1. *The Asserted Interests of Plaintiffs and Defendants In the Funds In Question Are Not Mutually Exclusive.*

In 1939, this Court rendered decisions in *Texas v. Florida* and *Massachusetts v. Missouri, supra*. Subsequently, it is fair to say, no analysis of a complaint by one sovereign state against another with respect to taxation can be complete without dealing with the principles laid down in those cases. Although the two cases were not heard and decided together, both were heard and decided in the same year, and the inference is fairly drawn that the Court had in mind the delineation of a threshold standard which must be met by a complainant state seeking access to this Court. The plaintiffs, however, make only passing reference to these cases in their Brief Supporting Motion for Leave to File Complaint (hereinafter Pls. Brief), and then only in contexts which *assume*, rather than argue for, the existence of a controversy, e.g. at 25.

In *Massachusetts v. Missouri, supra*, the issue was framed around the existence of several trusts, the corpus and trustees of which were then in Missouri, the settlor of those trusts

having died while domiciled in Massachusetts. The latter state claimed the right to tax the value of the trusts under Massachusetts law by virtue of the nature of the trust instruments, which arguably were intended to take effect in possession and enjoyment only after the death of the settlor. Missouri also claimed jurisdiction to tax, notwithstanding Massachusetts' claim that Missouri had waived the right to tax the trusts under a reciprocal exemption provision in its own law. Massachusetts claimed injury at the hands of Missouri in the amount of the lost tax revenue, and said that it had no remedy, as the subject matter was in the possession of the defendant sovereign state. The Court held that no controversy was presented between the states because their claims were not mutually exclusive, in that "the validity of each claim is wholly independent of that of the other and, in light of our recent decisions, may constitutionally be pressed by each state without conflict in point of fact or law with the decision of the other". *Id.* 308 U.S. 15; *see Curry v. McCanless*, 307 U.S. 357 (1939). The allegation that Missouri asserted its jurisdiction upon the property of a Massachusetts resident wrongfully under Missouri law was held not to frame a controversy between the states, as that action by Missouri in no way prevented Massachusetts from pursuing its rights and remedies under Massachusetts law to their fullest extent.

The application of that holding to the present complaint is brought clearly into focus by the undisputed facts that the plaintiff states are not and never have been taxpayers to the State of New Hampshire; that their right to tax is derived entirely from their respective state taxing statutes, and that the loss of revenue of which they now complain was a direct and immediate consequence of those same statutes, which operate to waive that right. *See* Income Tax Credit Laws, (Pls. Brief App., p. 61–62).

Thus, the plaintiff states' rights, if any, to the revenue they claim to have lost are wholly independent of any aspect of New Hampshire law, including its validity. No principle of law, constitutional or otherwise, requires that the plaintiff states forego the collection of revenue which is clearly within their constitutional power, solely because of the configuration or validity of the laws of another state. As the Court said in *Massachusetts v. Missouri*, "[e]ach state has enacted its legislation according to its conception of its own interests. Each state has the unfettered right at any time to repeal its legisla-

tion. Each state is competent to construe and apply its legislation in the cases that arise within its jurisdiction". 308 U.S. at 16, 17.

Thus, because the plaintiffs have the power to recoup their alleged losses through the valid exercise of their own sovereign authority (not to mention their having had the power to prevent any such losses *ab initio*, *infra* at 12), under the holding of *Massachusetts v. Missouri*, *supra*, the plaintiffs are not being and have never been injured by New Hampshire, and have no rights against New Hampshire susceptible of judicial enforcement.

The Court in *Massachusetts v. Missouri* distinguished *Texas v. Florida*, *supra* as a case which, on its facts, could not be resolved through the exercise of sovereignty of the plaintiff states, since under the laws of each the outcome turned upon the same issue of fact, to wit, domicile, and only one state, therefore, could lawfully levy a tax. 306 U.S. at 408. As mentioned above, there is no such mutually exclusive or "watershed" point of fact or law at issue in the present claim, since the plaintiffs' laws each tax their own citizens in the first instance, and they each have full constitutional power to do so irrespective of the power, or lack of power, of New Hampshire to tax the same subject matter.

2. *The Plaintiffs May Not Assert Claims On Behalf of Their Individual Citizens Under the Original Jurisdiction of this Court.*

The plaintiffs' claim, reduced to its bare essentials, is that New Hampshire has inflicted a direct injury upon their treasuries, in which they have a sovereign interest. Pls. Brief at 21-22. Yet, upon reflection, it is clear that there has been no such injury to the plaintiffs' treasuries, since the amounts of revenue conceded by the respective tax credit provisions necessarily caused one of two possible consequences: either additional revenues were raised from other sources to replace those amounts, assuming the level of governmental services to have been maintained; or the level of services to citizens of the plaintiff states has been reduced, assuming no additional revenues to have been raised. Upon either occasion, the impact of the escape of revenue through the tax credit provision must fall upon the citizenry at large, since a government of, by and for the people is not, in theory at least, designed to operate at a profit and put money in the pockets of those in charge of it.

The state, therefore, can have no interest in its treasury apart from that of its citizens, who collectively are entitled to have those funds applied to their benefit. The plaintiffs themselves assert the principle that the interested party is he who ultimately bears the burden, Pls. Brief at 24, but they misapply that principle in their argument, in that the principle is viable only where the shifting of the burden is *not* within the control of the ultimate bearer, as where a vendor of goods passes on a sales tax to purchasers, who have no control over the vendor. Pls. Brief at 24. Here, the transfer of the tax burden from the former taxpayers under the New Hampshire Commuters Income Tax to the plaintiff states, and thence to the citizenry at large of those states, is wholly within the control of the plaintiff states as sovereigns, and of their citizens, who are, through the legislative process, the actual sovereigns. Thus, any equitable disability which attaches to the sovereign states attaches to their citizens as well.

Said another way, any claim of injury by a citizen of the plaintiff states, other than one who was also a taxpayer to New Hampshire, is fundamentally a complaint about the wisdom of the statutory and administrative posture maintained by the plaintiff states throughout the duration of the New Hampshire Commuters Income Tax, and is thus a political complaint properly directed at the plaintiff states themselves through the legislative process.

As a consequence, then, of the very nature of the statutory provisions upon which the plaintiffs' claim to the so-called lost revenue is grounded, two results follow with relentless certainty: first, the chain of causality leading from the alleged injury is severed absolutely at the point at which the plaintiffs, having complete power to do so, failed to prevent the escape of revenue as it occurred, and still refuse to exercise their power to collect the funds from the persons from whom it is now due under their own law. To be consistent, the plaintiffs, having argued that the New Hampshire tax was unconstitutional and void, must also assert that the credits which were claimed with respect thereto were improper, and that those amounts are, in fact and law, now due from the taxpayers upon proper notice and demand. The plaintiffs cannot, we submit, argue for retroactive application of *Austin v. New Hampshire*, *supra* while at the same time asserting no retroactive application to their tax credit provision. Second, the cause, if any there be, belongs to the former taxpayers whose

incomes were taxed by New Hampshire, and who pursued their objections to that tax to a successful result. That the plaintiff states may not litigate in this Court such causes as accrue to those former New Hampshire taxpayers as a result of *Austin, supra*, is settled beyond question. *Illinois v. Michigan*, 409 U.S. 36 (1972); *Arkansas v. Texas*, 346 U.S. 368 (1953); *North Dakota v. Minnesota*, 263 U.S. 365 (1923); *New Hampshire v. Louisiana*, 108 U.S. 76 (1883). In particular, a state is barred from litigating the interest of a citizen in this Court where, as here, that interest adheres to the state solely as a result of statutes of that state, and not as a consequence of any equitable or contractual right. *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387 (1938).

It may not be doubted that the device employed by the plaintiffs of quoting from the Brief for the Appellees in *Austin v. New Hampshire, supra*, has a certain dramatic impact. Pls. Brief at 19. It does not, however, have much probative value when one considers that the position taken by the Appellee in *Austin* was an argumentative one; that that argument was emphatically contravened by the State of Maine in its Brief *amicus curiae* which argued at length the impact of the New Hampshire tax on the Maine taxpayers and citizenry at large; and that this Court found for the taxpayer/Appellant, thus discrediting the Appellee's position.

3. *The Plaintiff States Have No Assertable Quasi-Sovereign Interest Which Cannot Be Asserted By Their Citizens.*

The plaintiffs also attempt reliance upon certain cases in which this Court has taken jurisdiction of a complaint by one state seeking to enjoin actions of another state which are said to constitute a nuisance to citizens of the complaining state, e.g. *Missouri v. Illinois*, 180 U.S. 208 (1901); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); or which are said to divert natural resources, e.g. *Arizona v. California*, 373 U.S. 546 (1963); Pls. Brief at 24. Here also, the plaintiffs' reliance is misplaced. The theories upon which such cases are allowed to go forward are that (a) the claimed injury is ongoing and (b) it is not within the sovereign power of the plaintiff state to stop it or correct the damage. In either circumstance, the remedy is by injunction, which is wholly unnecessary here, since the New Hampshire tax has already been held unconstitutional and been terminated, and all collection activities stopped. The plaintiffs' prayer in their complaint for an injunction to order done what has already been done approcahes the frivolous, but is understandable, nevertheless, as a vain attempt to manufacture controversy where none exists, hoping thereby to come within the scope of *Missouri v. Illinois, supra*.

C. **The Former Taxpayers Under the Commuters Income Tax Are Necessary Parties to this Action.**

This Court has held, upon an application by one state for leave to file a complaint against a citizen of another state, that diverse citizens of the plaintiff state were indispensable parties defendant to the controversy, and that the case could not go forward without them, and further held that as those indispensable parties were citizens of the plaintiff state, the case could not go forward since the Court could not enlarge its original jurisdiction to include a suit between a state and citizens of the same state. *California v. Southern Pacific Company*, 157 U.S. 229 (1895).

As mentioned above, the plaintiff states have had no direct dealings with New Hampshire pursuant to the Commuters Income Tax Law, that is to say, they were not taxpayers under the taxing statute, RSA 77-B, and that statute created no rights in favor of the plaintiffs, nor liabilities upon them. The only persons within the contemplation of that statute were non-residents who earned income in New Hampshire, and residents who earned income out-of-state. It was from the former group that taxes were, in practical effect, levied and collected, *Austin v. New Hampshire, supra*. This Court's decision in *Austin* did not include an order for repayment, and none was sought from it. The mandate of the Court was for reversal and remand to the New Hampshire Supreme Court for further proceedings. Clearly, notwithstanding that New Hampshire firmly maintains that retroactive application of *Austin* would be inappropriate and inequitable, any litigation of that question *must* include as parties that class on whose behalf *Austin* was brought and decided, lest New Hampshire be subjected to multiple liability at the suit of such taxpayers, who would not be bound by the outcome of this case unless their interests had been adequately represented.

Moreover, as we assert at some length above, the plaintiffs' claim is really against their own citizens for the return of credits improperly taken, and they must maintain that asser-

tion and claim as an essential element of their claim against New Hampshire. Yet the mere fact that the present parties to this proceeding might agree upon the liability of a taxpayer to return the credits taken does not mean that the question is closed, since the taxpayer's pocketbook is at stake to a greater or lesser degree, and he has not been given an opportunity to be heard.

Thus, the cause asserted herein, when considered in its proper scope, necessarily includes parties whose presence renders the matter beyond the original jurisdiction of this Court. *California v. Southern Pacific Co., supra.*

D. **This Action Is Barred By the Doctrine of Laches.**

This Court, when considering a matter within its original jurisdiction, applies "the accepted doctrines of the common law or equity systems of jurisprudence", as guides to its decision. *Texas v. Florida, supra*, 306 U.S. at 405.

We have set out at length, above, in other contexts, the uncontrovertible fact that the plaintiff states have always had the power to stop the loss of funds to their treasuries which their tax credit laws caused. The plaintiff states now charge New Hampshire with having enacted the Commuters Income Tax in bad faith, in that its unconstitutionality was "clearly foreshadowed". Pls. Brief at 29. That assertion New Hampshire emphatically denies, but we hasten to point out that if the invalidity of the tax was so obvious from its inception, the plaintiffs, who are equally bound to know the law, have been grossly negligent and in bad faith for having ignored or pointedly failed to take the most patently obvious steps to halt the consequences of that tax which they now assign as an injury to them. *See Austin v. New Hampshire, supra*, (Opinion of Mr. Justice Blackmun, dissenting, *im passim*). In short, the plaintiffs are guilty of laches, and should not be allowed to maintain this action for that reason, quite apart from the other fatal aspects of the complaint set out above.

The extent to which the plaintiffs' damage, if any, is self-inflicted is brought clearly to fore by the observation that the decision of the New Hampshire Supreme Court in *Austin v. State Tax Commission*, 114 N.H. 137; 316 A. 2d 165 (1974) turned upon that court's finding of a lack of substantial injury to the taxpayer, given the availability of the Maine tax credit provision. Had that provision been repealed, or its benefit denied to the plaintiffs therein on the ground that the tax

against which it was claimed was void, the issue would have been squarely joined, and the whole complexion of that case changed, including, possibly, the result.

In either event, the issues now presented by the plaintiffs here could have been developed in the original proceeding in New Hampshire courts, and reviewed here on appeal if necessary. In the face of such a clear disregard of fair opportunities to make their complaints known to New Hampshire and to join in existing litigation, the plaintiffs should not now be permitted to use the original jurisdiction of this Court as an alternative remedy. Such use has been denied in the past, and should be denied here. *Illinois v. Michigan, supra.*

Additionally, the studied disinterest shown by the plaintiffs publicly, while private litigation of the New Hampshire tax was in progress, was clearly interpreted by New Hampshire as acquiescence in the effect, if not the principle, of the New Hampshire tax. Such acquiescence has also been held to bar later assertion of a contrary position. *Ohio v. Kentucky*, 410 U.S. 641 (1973).

II.

THE PLAINTIFFS HAVE NO CLEAR RIGHT TO RELIEF.

The merits of the plaintiffs' claim may be fairly described as comprising the question whether *Austin v. New Hampshire, supra* should be applied retroactively.

It is New Hampshire's sincere belief, and will be its position before this Court if the extant Motion For Leave to File Complaint is granted, that the *Austin* decision should not be so applied.

This is not the proper point procedurally for the defendant's arguments on the merits of retroactive application of *Austin* to be presented, in that many of the facts alleged are in dispute, and the complaint has not been formally allowed and answered. It should suffice at this point to state that each and every assertion and conclusion of law in the plaintiffs' Brief addressing their claim to relief, Pls. Brief at 28 *et seq.*, is emphatically denied.

CONCLUSION

The plaintiffs at this stage must seek and obtain the leave of this Court to bring this complaint under its original jurisdiction. The reasoning and cases set forth above compel the conclusion that such leave should be denied, and we respectfully request that this Court so hold.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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APPENDIX

MASSACHUSETTS DEPARTMENT OF CORPORATIONS AND TAXATION

INFORMATION FOR MASSACHUSETTS RESIDENTS WHO RECEIVED A MASSACHUSETTS INCOME TAX CREDIT FOR THE NEW HAMPSHIRE COMMUTERS INCOME TAX WHICH HAS BEEN DECLARED UNCONSTITUTIONAL BY THE SUPREME COURT OF THE UNITED STATES

The enclosed notice of intention to assess and a later notice of assessment are required to be sent pursuant to Massachusetts law. This action is protective in nature, and it is not planned to collect the tax from you at this time. The Massachusetts Attorney General has been requested by this Department and he has agreed to pursue all available remedies to collect these taxes directly from the State of New Hampshire. Meanwhile by sending these notices, this Department is preserving the Commonwealth's right to recover, if necessary, from its taxpayers the amounts of credits granted — if Massachusetts does not prevail in its action against New Hampshire.

However in order to protect yourself, you are urged to apply by letter to New Hampshire for a refund of the tax imposed on you under the New Hampshire Commuters Income Tax, which has been declared unconstitutional by the Supreme Court of the United States. For the *1971 tax*, your letter should be filed *before April 15, 1975*. It is suggested that you include your name, address and Social Security number and that you are requesting a refund of the specific amount paid by you for 1971 under the unconstitutional New Hampshire Commuters Income Tax. Send the letter to:

Commissioner of Revenue Administration
Concord, New Hampshire 03301

Similar applications should be made within three years from the due date for each applicable year since 1971.

Form 123-NH INFO

The Commonwealth of Massachusetts

IMPORTANT ADDITIONAL INFORMATION for Massachusetts Residents Who Received A Massachusetts Income Tax Credit for the New Hampshire Commuters Income Tax Which Has Been Declared Unconstitutional

In order to DISCHARGE ANY OBLIGATION you might have under the Notice of Intention to Assess which was mailed to you on April 3, 1975, with respect to repayment of the credit you received against your 1971 Massachusetts Income Tax, you may ASSIGN YOUR CLAIM against New Hampshire to the Commonwealth of Massachusetts and APPOINT THE MASSACHUSETTS ATTORNEY GENERAL to be your attorney for the collection of the taxes you paid to New Hampshire under the New Hampshire Commuters Income Tax, which has been declared unconstitutional.

Signing this form will *not* increase your total tax liability, will *not* make you liable for the costs or expenses of this litigation, and will *not* cost you any money. Signing this form *will* discharge any obligation you may have to repay Massachusetts for the tax credit previously granted for your 1971 payment of the New Hampshire Commuters Income Tax; and it will permit Massachusetts to try to collect from New Hampshire back taxes which the U.S. Supreme Court has ruled New Hampshire has no right to collect.

THE ENCLOSED FORM MUST BE SIGNED BY THE PERSON(S) SIGNING THE 1971 TAX RETURN, DATED AND MAILED BACK NO LATER THAN APRIL 11, 1975, TO:

The Commonwealth of Massachusetts
P. O. Box 7022
Boston, MA 02204

ASSIGNMENT OF TAXPAYER'S INTEREST
and
POWER OF ATTORNEY

I, _____.
(Insert Name and Spouse's Name, if filed jointly)

of _____.
(Number and Street)

_____.
(State and Zip Code)

hereby assign, transfer and set over unto the Commonwealth of Massachusetts, for value received, all of my right, title and interest in and to my claim for a refund of any taxes for 1971 to the State of New Hampshire under the New Hampshire Commuters Income Tax Law.

I do hereby constitute and appoint FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts, my attorney, irrevocably in my name, place and stead, to demand, sue for, levy, recover and receive all such sums of money which are now and which may hereafter become due, payable and owing to me for a tax refund as aforesaid. I grant said attorney full power to take all actions with respect to recovering said sums of money as I might or could do personally, hereby ratifying all that said attorney has lawfully done or caused to be done with respect thereto. All such actions shall be taken without cost or expense to me.

In witness whereof, I have hereunto set my hand this _____ day of April, 1975.

_____
(Taxpayer's Signature)

_____
(Spouse's Signature, if filed jointly)